TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 231.

OLD DOMINION STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED APRIL 24, 1905.

(19,306.)

(19,306.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 231.

OLD DOMINION STEAMSHIP COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

	Original.	Print.
Petition for appeal and supersedeas	1	1
Order allowing appeal and supersedeas	10	8
Proceedings before the State corporation commission	10	9
Letter of John A. Upshur, clerk, to W. L. Guillaudeu, president, September 2, 1903	11	9
Letter of W. L. Guillaudeu, president, to John A. Upshur, clerk, September 10, 1903	12	10
Statement of facts, &c	13	11
Ruling of commission	15	13
Exceptions to ruling	16	15
Chairman's certificate	16	15
Opinion	18	16
Judgment	23	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1904.

	Original.	Print
Clerk's certificate	24	18
President judge's certificate	24	19
Assignment of errors	25	19
Petition for writ of error	28	21
Order allowing writ of error	28	21
Bond on writ of error	29	22
Writ of error	31	23
Citation and service	33	24
Return to writ of error	34	24

1 In the Supreme Court of Appeals of Virginia, at Richmond.

OLD DOMINION STEAMSHIP COMPANY
vs.
COMMONWEALTH OF VIRGINIA.

To the honorable judges of the supreme court of appeals of Virginia:

Your petitioner, The Old Dominion Steamship Company, respectfully represents, that heretofore, to-wit: on the first day of September, 1903, it made its report to the State corporation commission of all its property which it was advised was liable to taxation under the laws of Virginia. That it did not include in such report certain steam vessels belonging to your petitioner and hereinafter enumerated because your petitioner not being a resident of the State of Virginia, but a citizen of the State of Delaware and because of said vessels being regularly enrolled under the laws of the United States outside of Virginia and engaged in commerce upon the navigable waters of the country, were not taxable by the State of Virginia; but were only taxable at their home port, to-wit where your petitioner resided and said vessels were enrolled.

That notwithstanding this the State corporation commission
2 heretofore, to-wit, on the 2nd day of September, 1903, insisted that your petitioner should send it a list of the said vessels, which your petitioner did on the 10th day of September, 1903, but under protest and with the request that a day be fixed by the said commission for a hearing of your petitioner. (See page 2, of Record for letter of Sept. 10th, 1903.)

That the 17th day of September was accordingly fixed for said hearing, when such proceedings were had that on the — day of November 1903 the said commission entered an order declaring all of said vessels taxable by the State of Virginia except the steamer Hampton, and proceeded to assess the same for taxation by the said State and also proceeded to locate certain of the said vessels for taxation by the cities of Richmond and Norfolk and the towns of Smithfield and Suffolk and the Hampton school district of Elizabeth City county, all of which will appear by reference to page 6 of the record of the proceedings of the State corporation commission relating thereto, a transcript of which containing all the facts upon which the said action of the commission was based has been certified under the seal of the said commission to this honorable court by the Hon. Beverly T. Crump, chairman of the State corporation commission, and is herewith filed and exhibited.

Your petitioner is advised and represents that the said order and action of the said commission are erroneous and that it is aggrieved thereby in many respects, as will hereafter appear.

It will appear from the record that your petitioner was incorporated by the legislature of the State of Delaware and therefore is not a resident of the State of Virginia. That it is engaged in transporting passengers and freight between certain ports in Virginia and the city of New York and other points outside of Virginia.

In the prosecution of its said transportation business it owns and operates a number of steamboats and other vessel property, namely, the said steamers Hampton, Mobjack, Hampton Roads, Luray, Accomack, Virginia Dare, Brandon, Berkley and the steam tug Germania.

These vessels, with the exception of the last named, visit various ports within the State of Virginia for the purpose of receiving freight for which they issue bills of lading for points outside of the State of Virginia. Owing to the shallow waters where they ply it is impossible for the larger ocean going steamers of your petitioner to be used. They therefore receive the freight as aforesaid, giving the shipper a bill of lading for the same, destined to the port of New York and other points outside of Virginia and bring it to deeper water at Norfolk and Fort Monroe, Virginia, where, upon the
3 same bill of lading the said freight is transferred to one of the larger ocean going vessels of the steamship company, and so the ultimate destination to New York and elsewhere outside of Virginia is reached. That any other business transacted by the said vessels is incidental in character and comparatively small in amount. That the said vessels were built and designed for interstate traffic and that each and all of them were regularly enrolled pursuant to the laws of the United States outside of the State of *the State of* Virginia, with the name and port of enrollment painted on the stern of each of them, that the said vessels, though capable of use on the ocean were then used on established routes upon navigable waters within Virginia as set out in the record. (See page 5.) That said vessels were all held liable by your petitioner to go outside of Virginia upon any of the navigable waters of the United States whenever more profitable employment could be found for them, and *and* that one of the said steamers, to-wit, the Hampton, was at the time of the said hearing actually employed in waters within the State of New York.

It is respectfully insisted on the part of your petitioner that the said vessels being owned by a non-resident and regularly enrolled under the laws of the United States, and engaged in commerce upon the navigable waters of the country are not taxable by the State of Virginia or elsewhere than at their home port. Vessels such as those involved in this proceeding are by congressional legislation peculiarly and especially the subject of Federal law and regulation. Section 4141, U. S. Rev. Statutes, provides as follows:

"SEC. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest

to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides."

Vessels engaged in the coastwise trade or on other navigable waters of the United States are, by sections forty-three hundred and eleven (4311) and forty-three hundred and twelve (4312), United States Revised Statutes, enrolled as distinguished from those engaged in foreign trade, which by section forty-one hundred and forty-one (4141) are registered. The qualifications as to ownership and place of enrollment are the same as in case of registration.

Vessels enrolled under this provision become vessels of the United States.

4 "Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States, entitled to the privileges secured to such vessels by the act for enrolling and licensing ships or vessels to be employed in the coasting trade. 1 Stat. 205, 287."

Transportation Co. *vs.* Wheeling, 99 U. S., 278.

The place of enrollment so provided by this act is in law the "home port" of the vessel. Owing to the fugitive character of such property, possessed of the power to move at the will of its master anywhere on the navigable waters of the country, and designed for trade whenever the same may be found profitable anywhere upon the broad waters of the United States or elsewhere on the water highways of the world, it became pre-eminently necessary that some particular abiding place should be fixed and declared by law for them. Accordingly Congress has declared that the permanent abiding place of United States vessels shall be the port of enrollment, the port nearest the residence of the owner the home port. Certain characteristics or qualities have been imparted to these vessels by Federal legislation and the admiralty rules of the civilized world. Such for example as giving those who furnish them with supplies in any other than their "home port" a lien on such vessels for such supplies, and again, giving to her master power when she is overtaken by any particular stress of placing a lien upon her which shall be prior to all others, namely, a bottomry bond. Again, we find such property the particular source of national solicitude in the laws enacted by Congress and known as the limited liability act. Congress recognizing the need of building up a merchant marine, but equally appreciating the dangers to which vessels are exposed by reason of their being obliged in the course of their business to visit foreign waters and jurisdictions and become exposed to the dangers of the sea and river navigation, with a view of encouraging the investment of capital in such property, has declared, that the liability of the owners of such vessels for the negligence etc. of their masters shall be limited to the value of the interest of such owner. In a word United States vessels differ in

many essential and material respects from all other personal property, and the rules with reference to the taxation of personal property on land are not a guide to the taxation of ships. If ships could be taxed at any port where they habitually call or where they may trade great uncertainties would arise and injustice result. Hence the Supreme Court of the United States has uniformly held that because of their peculiar nature and employment and because Congress has fixed their "home port" they cannot be taxed as of their actual *situs* but only at their "home ports."

Justice Brewer, in the Pullman Palace Car Company *vs.* Twombly, 29 Fed. 658, 665: speaking of the difference between other tangible property and vessel property said as follows:

"The place where a vessel is registered is by law its home port. That is considered its *situs* * * * An attempt is made to place commerce by land in the same position as commerce by water, and to make in the former case the domicile of the owner equivalent to the port of registry in the latter. But until there has been some legislative declaration of equivalent import the obvious distinction between the two must be enforced and the ordinary rule of the *situs* of tangible property for purpose of taxation be applied to vehicles used in commerce on land."

— Hayes *vs.* Pacific Mail Steamship Company, 17 Howard 596, an effort was made by the State of California to tax certain vessels belonging to the Pacific Mail Steamship Company a corporation duly chartered in the State of New York, where the said vessels were owned and registered. The vessels in this case plied between New York and San Francisco, and between the lat-er port and certain ports in Oregon.

Mr. Justice Nelson, delivering the opinion of the court, after citing the registry acts of the United States above quoted, proceeds as follows:

"These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessel- of the plaintiffs was the port of New York, where they were duly registered and where all the individual owners are resident and where is also the principal place of business of the company, and where, it is admitted, the capital invested is subject to State, county and other local taxes.

"These ships are engaged in the transportation of passengers, merchandise, &c., between the city of New York and San Francisco by the way of Panama and between San Francisco and different ports in the Territory of Oregon. They are thus engaged in the business and commerce of the country, upon the history of nations, touching at such ports and places as these great interests demand and which held out to the owners sufficient inducements, by the profits realized or expected to be realized. And so far as respects

the ports and harbors within the United States they are en-
6 tered and cargoes discharged or laden on board independently of any control over them, except as it respects municipal and sanitary regulations of the local authorities such as are not inconsistent with the constitution and laws of the General Government, to which belongs the regulation of commerce with foreign nations and between the States.

"Now it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union into the ports of which the vessels entered in the prosecution of their trade and business, might also impose a like tax. It may be that the course of trade or other circumstances might not occasion so great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, &c., which in no respect can affect the question as to the *situs* of the property in view of the right of taxation by the State.

Besides, whether the vessel leaving her home port for trade and commerce visits in the course of her voyage or business several ports or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years in the foreign carrying trade seeking cargo, carrying and unloading it from port to port during all the time absent; but they neither lose their national character nor their home port as inscribed upon their stern.

"The distinction between a vessel in her home port and when lying at a foreign one, or in the port of another State; is familiar in the admiralty law. She is subjected in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat., 488.

"We are satisfied that the State of California had no jurisdiction over these vessels, for the purpose of taxation; they were not, properly abiding within the limits so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

The steamboat property of the Old Dominion Steamboat Com-
7 pany, operated as above described, is as clearly engaged in the business and commerce of the country upon its highways as in the case just quoted from. These vessels are neither

owned by citizens or residents of the State of Virginia, nor enrolled or registered in that State.

The record in this case does not show whether the vessels of your petitioner were ac-ually taxed at their home port or not.

It matters not whether they are actually so taxed by the State where their owner resides and they are enrolled. They are *liable* to taxation there and that answers the law.

This was expressly held in Morgan *v.* Parham, 16 Wall., 471. The court says in the case where the State of Alabama was attempting to tax the vessel property of a citizen of New York and registered in New York as follows:

"Whether the steamer 'Frances' was actually taxed in New York during the years 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case, I have supposed."

Your petitioner is aware that this honorable court in the case of Norfolk and Western Railway Company *vs.* Board of Public Works, 97 Va., 23, has decided, that the fact "that tugs and barges are engaged in interstate commerce does not exempt them from taxation, nor does the place of their enrollment or registration fix their *situs* for taxation, though it is a circumstance to be considered in its determination." It must be observed, however, that that was a case in which the vessel property was owned by a Virginia corporation, and the decision was based on that fact, the court holding that the property belonged to a citizen of the State of Virginia and was therefore taxable in the State where the owner resided. The court might very well have added that the steam tugs and barges of the Norfolk and Western Railroad Company being owned in Virginia were not and could not legally be enrolled at any other port in the United States than that one in Virginia nearest the place of residence of the Norfolk and Western Railroad Company. In a word, if they were enrolled or registered outside of Virginia, being the property of the Norfolk and Western Railroad Company, a Virginia corporation, then such enrollment would have been in express violation of the United States statute, section 4141 U. S. Revised Statute- above quoted. This case is therefore one distinctly in point for your petitioner. The vessel property of the Norfolk and Western Railroad Company was owned in Virginia and only capable under the
8 United States statute of being enrolled at a port within that State. This qualification of ownership and enrollment distinctly obtains in behalf of your petitioner, as it is a non-resident of Virginia, and its vessels are regularly enrolled under the United States statutes referred to. This decision is expressly justified by the utterance of the Supreme Court of the United States in Transportation Company *vs.* Wheeling, 99 U. S. 273. The syllabus of that case is as follows:

"Steamboats which ply between different ports on a navigable river may, under a State statute, be taxed as personal property by the city where the company owning them has it principal office, and which is their home port, although they are duly enrolled and licensed as coasting vessels under the laws of the United States, and all fees and charges thereon, demandable under those laws, have been duly paid."

The State of Michigan has expressly upheld the doctrine contended for by the Old Dominion Steamship Company.

In Roberts *vs.* Charlevoix Twp., 60 Mich. 192, Campbell, J. said for the court that a vessel owned by a non-resident and registered under the United States navigation laws does not, by engaging in business within the State become subject to its taxing power, and ends the discussion by saying:

"This doctrine having been settled by the court of last resort there would be no propriety in discussing it."

The State of Florida has with equal emphasis announced the same doctrine.

In Johnson *vs.* De Bary-Baya Merchants Line, 37th Fla. 499, the court says:

"The vessels were owned by a New York corporation and had acquired a *situs* in that State by being registered in the port of New York, the nearest to the residence of the owner, and were engaged in commerce in that State where, it is conceded, the most profitable employment could be procured for them. The mere fact of being employed in interstate commerce would not exempt them from taxation, and we do not say that registration in a foreign port and non-resident ownership should control absolutely, but such ownership and registration render them primarily and presumptively taxable only in their home port. This is clearly the doctrine of the Supreme Court of the United States—the court of last resort in such a case.

9 The boats of the non-resident corporation were used in the very business for which they were constructed, and they were in Florida waters because they could be more profitably employed there. Some of them were transferred to other fields as profit dictated, and it does not appear that they all might not have been taken away at any time if it had been to the interest of the owner to move them."

The vessels in this case were used in trading on the St. John's river and as adjuncts to the Clyde line, a transportation company engaged in coastwise traffic between Florida and New York. The court in this case speaking further on the subject says:

"All property should in justice pay its proportionate part of tax burdens in return for protection given; but one State should not lay taxes upon citizens of other States unless their property has acquired a *situs* in the taxing locality so as to become a part of the property there situated.

* * * * * * *

"The character of such property is such as to give rise to the just rule under the United States registry acts that it is primarily taxable only at the home port where the owner resides."

Your petitioner respectfully insists that its said vessels are only taxable by the State where it resides and where they are duly registered as United States vessels, just as this honorable court has decided in favor of its citizen- in the Norfolk and Western Railroad *vs.* Board of Public Works, *supra.*

If it were otherwise then your petitioner's vessels would be subject to taxation not only at their home port, the residence of your petitioner, but also wherever they might happen to be employed in trade upon the navigable waters of any of the States of the Union.

It was to avoid this injustice among other things that the wise, if somewhat arbitrary rule was adopted by the United States in fixing the *home*, the permanent abiding place, of such vessels, at the port nearest the place of residence of the owner.

Your petitioner respectfully submits that the action of the commission in holding the said vessels liable to taxation by the State of Virginia is a regulation of interstate commerce by the State of Virginia in violation of and repugnant to article 1, section 8, clause 3, of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes.

Wherefore, and for other reasons herein assigned and appearing upon the record, your petitioner prays for an appeal from the action of the said commission in the several respects hereinbefore
10 set out, and also for a writ of supersedeas to such final action, order and judgment of the said commission, and also that this honorable court may review and reverse the said order and finding of the said commission and enter such order as may be just and right.

And as in duty bound your petitioner will ever pray, etc.

OLD DOMINION STEAMSHIP CO.,
By WHITE, TUNSTALL AND THOM,
Its Counsel.

We, Wm. H. White and Richard B. Tunstall, counsel, practicing in the supreme court of appeals of Virginia, do hereby certify, that, in our opinion, it is proper that the decision and action of the State corporation commission, complained of in the foregoing petition, should be reviewed by this honorable court.

WM. H. WHITE.
RICH'D B. TUNSTALL.

Appeal allowed and supersedeas awarded. But the said supersedeas shall not take effect until the petitioner shall have executed and filed with the State corporation commission a suspending bond, approved by it, payable to the Commonwealth, and sufficient in

amount and security to insure the prompt payment by the said petitioner of any amount for taxes, for which it may be declared liable by the final decision of this court on appeal.

Jan. 29, 1904.

VIRGINIA:

Proceedings Before the State Corporation Commission, Sitting as a Court, at its Offices in the City of Richmond, Virginia, on the 17th Day of September, 1903.

COMMONWEALTH OF VIRGINIA at the Relation of the STATE CORPORATION COMMISSION
vs.
OLD DOMINION STEAMSHIP COMPANY.

In the matter of assessing for taxation the steamships, steam-
11 boats and other floating property of the Old Dominion Steamship Company.

Be it remembered, that heretofore, to-wit: on the first day of September, 1903, in the report made by the Old Dominion Steamship Company to the State corporation commission, of its property, subject to taxation under the laws of Virginia, it omitted certain of its vessels and steamships, to-wit: the steamers Hampton, Mobjack, Hampton Roads, Luray, Accomac, Virginia Dare, Brandon, Berkley and the steam-tug Germania; that on the 2nd day of September, 1903, the clerk of the State corporation commission wrote the president of the Old Dominion Steamship Company calling upon him to send in a list of said vessels, which letter was in the following words and figures, to-wit: That in response to this letter and under protest the Old Dominion Steamship Company answered as follows, to-wit:

RICHMOND, *September 2d*, 1903.

Mr. W. L. Guillaudeu, president Old Dominion Steamship Company, New York.

DEAR SIR: I beg to acknowledge receipt of report made by your company, which will be brought to the attention of the commissioners on their return to Richmond on Monday next. I note that you have not included in this report any of your steamboats engaged entirely in intrastate traffic, such as your James River line, Severn and Ware River line, Suffolk, Smithfield, &c, In order that this matter may properly be placed before the commissioners I would request that a list of these steamers be furnished, together with tug-

boat, floating property in the way of barges, &c., used in Norfolk harbor.

Yours very truly, JOHN A. UPSHUR, *Clerk.*

That in response to this letter, and under protest, the Old Dominion Steamship Company answered as follows, to-wit:

12 NEW YORK, *Sept 10th*, 1903.

John A. Upsher, Esq., clerk to the State corporation commission, Richmond, Va.

DEAR SIR: Your favor of Sept. 2nd. has not been earlier replied to owing to unavoidable absences from the office.

I note that you request that we furnish a list of the "steamboats engaged entirely in interstate traffic, as your James River line, Severn and Ware River line, Suffolk, Smithfield, etc." omitted from the report heretofore rendered by the company.

I beg to say that in no case has the company any vessels engaged entirely in intrastate traffic. On the contrary the establishment and maintainance of these lines is for the purpose of performing interstate business, and they are but subsiduary branches of the main New York and Virginia line.

That they do perform some intrastate passenger and freight business, is of course, true, but incidentally so only, and in a very small proportion to the total business performed by them. It is for this reason that they have been previously omitted, or reported under protest, and while still protesting against their inclusion in the assessment against the company, I comply with your request by enclosing you a list of such property, together with its estimated valuation, as follows:

Steamers, Hampton
Mobjack
Hampton Roads
Luray
Accomack
Virginia Dare
Brandon
Berkley
Steam tug Germania
Seven barges.
Aggregating $207,800.

Should the commission be unwilling to concede that this property is not taxable under the State law, I will thank you to advise
13 me at my New York office of the time when the commission will hear the company on this question.

Awaiting your reply, I remain,

Very respectfully yours,

(S'g'd) W. L. GUILLAUDEU,
President and General Manager."

Accordingly the 17th day of September 1903, was fixed by the State corporation commission for hearing the steamship company. On which hearing the following facts were adduced before the said commission, namely: That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the senate and house of representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic ocean and communicating navigable waters, between the city of New York in the State of New York and Norfolk and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said transportation business owned and operated the vessel property above named, that these vessels with the exception of the tug Germania whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside of the State of Virginia: that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean going steamers of the company to be used: that in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean going vessels of the steamship company, and so the ultimate destination, namely New York and elsewhere outside of Virginia was reached; that any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially and were adjuncts to or
14 branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia with the name and port of such enrollment painted on the stern of each of them; that the said vessels though regularly enrolled and licensed for coastwise trade were then used on old established routes upon navigable waters within Virginia as follows, to-wit:

First. The steamer Hampton Roads between Fort Monroe and Hampton and Norfolk.

Second. The steamer Mobjack between points in Mathews and Gloucester counties and Norfolk.

Third. The steamers Luray and Accomack between Smithfield and Norfolk.

Fourth. The steamer Virginia Dare between Suffolk and Norfolk.

Fifth. The steamers Berkley and Brandon between Richmond and Norfolk; and

The steamers Berkley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901 or early in 1902, one of them having been constructed at the William R. Trigg ship yard in the city of Richmond, and the other outside of the State of Virginia. Early in the year 1902, they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route and since that time, the Old Dominion Steamship Company, has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of state room accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the State of Virginia -or a license to sell liquor at retail on each of these steamers and
15 on July 1st, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30th, 1903. On or about the same time, the said steamship company complied with the revenue laws of the United States and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903, the said steamship company in order to obtain licenses to sell liquor at retail on each of these steamers applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, approved April 16th, 1903, and so obtained licenses for the year 1903–1904 to sell liquor at retail on each of these steamers on their route between the city of Richmond and Norfolk, and likewise, on or about the same time complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean going steamers of the Old Dominion Steamship Company and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

And thereupon the said steamship company, by its counsel, insisted that the said vessels, being owned by a non-resident and regularly enrolled under the laws of the United States outside of

the State of Virginia and used as above set out, were not liable to taxation under the laws of Virginia on the ground, among others, that the said taxation was a regulation of interstate commerce by the State of Virginia in violation of and repugnant to article 1, section 8, clause 3, of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes.

And the said State corporation commission took time to consider of their conclusion in the premises and subsequently entered an order declaring all of the said vessels taxable by the State of Virginia except the steamer Hampton and assessing the same for taxation for the year 1903 as follows, to-wit:

Names of Routes and Mileage Over Which the Old Dominion Steamship Company Operates.

From	To	Miles.	From	To	Miles.	From	To	Miles.
A. Norfolk	Old Pt. and Hampton	17						
B. Norfolk	Matthews Co. points	100						
C. Norfolk	Smithfield	27						
D. Norfolk	Suffolk	40						
J. R. Norfolk	Richmond	113						

Total miles operated in Virginia, 297 miles.

Location of property.		Value of all express cars and horses and wagons.	Value of all steamships, steamboats, or other floating property, their machinery and equipments.	Value of all depots, wharves, sheds, offices, stores, docks, machine shops, granaries, elevators, and other buildings.	Value of all real estate and personal property not included in the foregoing classifications.	Value of all miscellaneous property.	Total value of all property.	
County or corporation.	School district.							
		Whole dollars.	*Whole dollars.*	*Whole dollars.*	*Whole dollars.*	*Whole dollars.*	*Whole dollars.*	
Norfolk			72,500.					St'rs "Mob Jack and Accomac," one steam tug and seven barges.
Richmond			200,000.					"Berkley and Brandon."
Suffolk			6,800.					"Virginia Dare."
Smithfield			17,500.					"Luray."
Elizabeth City	Hampton		40.00					"Hampton Roads."
			336,800.					

16 & 17 To which ruling and action of the said commission the said Old Dominion Steamship Company, by counsel, excepts on the ground among others that the said taxation is a regulation of interstate commerce by the State of Virginia in violation of and repugnant to article 1, section 8, clause 3 of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes, and prays that its exceptions may be made a part of the record of this proceeding for the purposes of an appeal which is accordingly done.

NOTE.—It was and is a concession in the case that the seven barges mentioned in the letter of W. L. Guillaudeu to the commission, dated September 10th, 1903, differ from the other vessels herein enumerated in that they are used only in the harbor of Norfolk and not enrolled outside of the State of Virginia and by their construction not capable of ocean navigation.

The chairman of the State corporation commission doth hereby certify to the supreme court of appeals of Virginia that the foregoing contains and sets out all the facts upon which the action of the commission in the matters herein referred to was based, and which are essential to the proper decision of the appeal to be taken from such action, and is also a true transcript of the proceedings had as aforesaid before the commission.

Witness the seal of the State corporation commission and the signature of the Honorable Beverly T. Crump, chairman thereof, this 26th day of January, in the year 1904, and in the 128th year of the Commonwealth.

[State Corporation Commission Seal.]

BEVERLEY T. CRUMP, *Chairman.*

A copy.

Teste: H. STEWART JONES, *C. C.*

18 VIRGINIA:

In the Supreme Court of Appeals, at Richmond, March 17, 1904.

OLD DOMINION STEAMSHIP COMPANY, Appellant,
vs.
COMMONWEALTH OF VIRGINIA, Appellee.

Upon appeal from a finding of the State corporation commission, entered on the — day of November, 1903, declaring the steamers Mobjack, Accomac, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkeley, and the steam tug Germania and seven barges, property of appellant, taxable under the laws of the State of Virginia, and imposing a property tax thereon for the year 1903.

The facts presented by the transcript of the record of the finding aforesaid are as follows:

That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the senate and house of representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic ocean and communicating navigable waters, between the city of New York, in the State of New York, and Norfolk, and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said transportation business owned and operated the vessel property above named; that these vessels, with the exception of the tug Germania whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they issued
19 bills of lading and tickets to points outside the State of Virginia; that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above numerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination, namely, New York, and elsewhere outside of Virginia, was reached; that any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York

and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia with the name and port of such enrollment painted on
20 the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade were then used on old established routes upon navigable waters within Virginia as follows, to-wit:

First. The steamer Hampton Roads between Fort Monroe and Hampton and Norfolk.

Second. The steamer Mobjack between points in Mathews and Gloucester counties and Norfolk.

Third. The steamers Luray and Accomac between Smithfield and Norfolk.

Fourth. The steamer Virginia Dare between Suffolk and Norfolk.

Fifth. The steamers Berkeley and Brandon between Richmond and Norfolk; and

The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901 or early in 1902, one of them having been constructed at the William R. Trigg ship yard in the city of Richmond, and the other outside of the State of Virginia. Early in the year 1902, they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon
21 this route and since that time, the Old Dominion Steamship Company has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of stateroom accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the State of Virginia for a license to sell liquor at retail on each of these steamers, and on July 1st, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30th, 1903. On or about the same time, the said steamship company complied with the revenue laws of the United States and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903, the said steamship company, in order to ob-
22 tain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, ap-

proved April 16th, 1903, and so obtained licenses for the year 1903–1904 to sell liquor at retail on each of these steamers on their route between the city of Richmond and Norfolk, and likewise, on or about the same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal *situs* of the vessels and barges assessed for taxation by the finding of the State corporation commission is, for that purpose, within the jurisdiction of the State of Virginia, and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned
23 by a non-resident corporation, that they may have been enrolled under the act of Congress at some port outside the State of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore, it seems to the court here that the finding of the State corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant thirty dollars damages and its costs by it about its defence expended upon this appeal.

All of which is ordered to be entered upon the order book here, and certified to the State corporation commission, to be entered of record in its order book there, as required by law.

24 In the Supreme Court of Appeals of Virginia, at Richmond.

OLD DOMINION STEAMSHIP COMPANY
v.
COMMONWEALTH OF VIRGINIA.

STATE OF VIRGINIA,
City of Richmond, } *To wit:*

I, H. Stewart Jones, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify that the foregoing printed record contained in sixteen pages and one page of index, and six additional manuscript pages, is a true and perfect copy of the record of the suit aforesaid remaining in the clerk's office of the said court at the city of Richmond, Virginia, upon which said record the case was heard, tried and determined by the court aforesaid.

In witness and attestation whereof I hereunto set my hand and

affix the seal of said court at Richmond, Virginia, on this the 14th day of April, 1904.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond.

STATE OF VIRGINIA, } *To wit:*
City of Richmond, }

I, James Keith, one of the judges and president of the supreme court of appeals of Virginia, do hereby certify that the attestation of the above record of Old Dominion Steamship Company *vs.* The Commonwealth of Virginia, remaining in the clerk's office of the said court at Richmond, Virginia, made by H. Stewart Jones, the clerk of said court at Richmond, aforesaid, is in due form.

Given under my hand and seal this the 14th day of April 1904.

JAMES KEITH, [SEAL.]
President Supreme Court of Appeals of Virginia, at Richmond.

25 The Honorable James Keith, president supreme court of appeals of Virginia:

OLD DOMINION STEAMSHIP COMPANY }
v.
COMMONWEALTH OF VIRGINIA. }

Upon appeal from a finding of the State corporation commission, entered on the — day of November, 1903, declaring the steamers Mobjack, Accomac, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkley, and the steam tug Germania and seven barges, property of appellant, taxable under the laws of the State of Virginia, and imposing a property tax thereon for the year 1903.

Assignment of Errors.

Old Dominion Steamship Company, the plaintiff in error, comes and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled cause and makes the following assignment.

The supreme court of appeals of Virginia erred in affirming the finding of the State corporation commission of Virginia, that the vessels of the plaintiff were taxable by the State of Virginia and assessing the same for such taxation. And in holding such assessment of the plaintiff's vessels not to be in conflict with the Constitution of the United States, and of laws made in pursuance thereof.

The validity of the said finding of said commission and taxation

of said vessels, was controverted and drawn in question by the plaintiff in error on the ground of the same being repugnant
26 to the Constitution of the United States and to laws of Congress made in pursuance thereof, and in contravention thereof, in the following particulars:

First. The supreme court of appeals erred in affirming the finding of the State corporation commission and in holding that the legal *situs* of the vessel property of the Old Dominion Steamship Company in the proceedings mentioned and assessed for taxation by the said commission was for that purpose within the State of Virginia, and amenable to the tax imposed thereon, notwithstanding said vessels were owned by the plaintiff, a corporation of the State of Delaware and a citizen of the United States, and duly enrolled outside the State of Virginia pursuant to the acts of Congress, licensed for the coasting trade, and engaged in interstate commerce, which holding and decision are in violation of sections 4131, 4141, 4311 and 4312 of the Revised Statutes of the United States.

Second. The said final judgment and decision of the said supreme court of appeals is erroneous in not holding the said taxation of the vessels of the plaintiff in error, to be a regulation of interstate commerce by the State of Virginia, in violation of, and repugnant to, article I, section 8, clause 3, of the Constitution of the United States, which gives to Congress the power to regulate commerce among the several States and with the Indian tribes.

For which errors the plaintiff in error, Old Dominion Steamship Company, prays that the judgment of the supreme court of appeals of Virginia, dated the 17th day of March, 1904, affirming the
27 finding and action of the State corporation commission in assessing the said vessels of the said plaintiff in error for taxation by the State of Virginia, be reversed and a judgment entered for the plaintiff and for costs.

WM. H. WHITE,
Attorney for Old Dominion Steamship Company.

28 The Hon. James E. Keith, president supreme court of appeals of Virginia.

OLD DOMINION STEAMSHIP COMPANY
vs.
COMMONWEALTH OF VIRGINIA.

Upon appeal from a finding of the State corporation commission, entered on the — day of November, 1903, declaring the steamers Mobjack, Accomac, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkley, and the steam tug Germaina and seven barges, property of appellant, taxable under the laws of the State of Virginia, and imposing a property tax thereon for the year 1903.

Petition for Writ of Error.

The Old Dominion Steamship Company considering itself aggrieved by the final decision of the supreme court of appeals of Virginia, rendered on the 17th day of March, 1904, in this cause, in affirming the finding of the State corporation commission and declaring the vessels of the petitioner in said cause mentioned, liable to the tax imposed thereon by the Commonwealth of Virginia, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors is hereto attached.

WM. H. WHITE,
Attorney for Old Dominion Steamship Company, Petitioner.

Supreme Court of Appeals of Virginia.

Let the writ of error issue upon the execution of a bond by the plaintiff, Old Dominion Steamship Company, to the defendant, Commonwealth of Virginia, in the sum of three thousand ($3,000) dollars; said bond when approved to act as a supersedeas.

Dated April 13th, 1904

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

29 Copy.

Supreme Court of the United States.

OLD DOMINION STEAMSHIP COMPANY
vs.
COMMONWEALTH OF VIRGINIA.

Bond.

Know all men by these presents, that we, the Old Dominion Steamship Company, a corporation organized under the laws of the State of Delaware, as principal, and the American Surety Company of New York, a corporation duly incorporated under the laws of the State of New York, of 100 Broadway, city, county and State of New York, as surety, are held and firmly bound unto the Commonwealth of Virginia, in the sum of three thousand dollars ($3,000.) to be paid to the said Commonwealth of Virginia, to which payment, well and truly to be made, we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 13th day of April, A. D. 1904.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the supreme court of appeals of Virginia:

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

OLD DOMINION STEAMSHIP COMPANY,
By JOHN F. MAYER, *Its Agent.*
[CORPORATE SEAL.] AMERICAN SURETY COMPANY OF NEW YORK,
By LEONARD DAMMANN,
Resident Vice President.

Attest: ROB'T LE MASURIER,
Resident Ass't Secretary.

The above is approved

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

30 The original of the foregoing supersedeas bond was lodged with the clerk of the supreme court of appeals of Virginia on April 13th 1904, and the following endorsement made thereon: Bond filed 13th day of April 1904.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

[Endorsed:] Bond filed April 13, 1904.

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of appeals of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of Virginia before you, at Richmond, at the March term 1904 thereof, between Old Dominion Steamship Company, plaintiff and Commonwealth of Virginia defendant, a manifest error hath happened, to the great damage of the said plaintiff Old Dominion Steamship Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand nine hundred and four.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
for the Eastern District of Virginia,
By JOSEPH P. BRADY,
Deputy Clerk.

Allowed
JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

[Endorsed:] Old Dominion S. S. Co. *v.* Commonwealth. Writ of error. Filed April 13, 1904.

32 The original of the foregoing writ of error was lodged with the clerk of the supreme court of appeals of Virginia on the 13th day of April 1904, and also at the same time and place a copy thereof for the defendant Commonwealth of Virginia. The following endorsement was made upon the said original writ and upon the copy: Writ of error. Filed April 13th, 1904.

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

33 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of appeals of Virginia, wherein you are defendant and Old Dominion Steamship Company is plaintiff in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the chief justice of the supreme court of appeals of Virginia, this 14th day of April, 1904.

JAMES KEITH,
President of the Supreme Court of Appeals of Virginia.

Attest: H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia.

Service accepted April 14th, 1904.
WILLIAM A. ANDERSON,
Attorney General for the Commonwealth of Virginia.

34 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, } *ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court of appeals, in the city of Richmond, this 14th day of April, 1904.

Fee for record $14.00.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia,
at Richmond.

Endorsed on cover: File No. 19,306. Virginia supreme court of appeals. Term No. 231. Old Dominion Steamship Company, plaintiff in error, *vs.* Commonwealth of Virginia. Filed April 22nd, 1904. File No. 19,306.

Supreme Court of the United States.

No. 231.

OLD DOMINION STEAMSHIP COMPANY

v.

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR PLAINTIFF IN ERROR.

THE QUESTION INVOLVED.

CAN THE STATE OF VIRGINIA CONSISTENTLY WITH ARTICLE I, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES AND THE ACTS OF CONGRESS PURSUANT THERETO LAWFULLY TAX VESSELS OWNED BY NON-RESIDENT CITIZENS, DULY ENROLLED UNDER THE NAVIGATION LAWS OF THE UNITED STATES LICENSED FOR AND ENGAGED IN THE COASTWISE TRADE?

HISTORY OF THE CASE.

Under recent legislation it is made the duty of every corporation, foreign and domestic, doing business in Virginia

to report to the State Corporation Commission its property for taxation.

Accordingly the Old Dominion Steamship Company, the plaintiff in error, made report of all its property liable to taxation by said Commission.

It declined to report certain of its vessels, namely the steamers *Hampton*, *Mobjack*, *Hampton Roads*, *Luray*, *Accomac*, *Virginia Dare*, *Brandon* and *Berkley*, because these steamers belonged to the plaintiff in error, a non-resident of Virginia, all of which were regularly enrolled outside of that State and duly licensed for the coastwise trade and lawfully engaged in such trade upon the navigable waters of the United States and were only liable to taxation at their home port.

Notwithstanding this the State Corporation Commission on the 2d day of September, 1903, insisted that the plaintiff in error should send it a list of the said vessels, which it proceeded to do under protest on the 10th day of September, 1903, accompanied with the request, however, that a day be fixed for a hearing. (See correspondence in certified facts, pages 9–10 of record.)

Accordingly, the 17th day of September, 1903, was designated for such hearing and such proceedings were then had that on the day of November, 1903, the said Commission entered an order declaring all the said vessels taxable by the State of Virginia except the steamer Hampton (that steamer being at the time under charter in New York) and proceeded to assess the same for taxation by the said State and also proceeded to locate certain of said vessels for taxation by the cities of Richmond and Norfolk and the

towns of Smithfield and Suffolk and the Hampton School District of Elizabeth City County, all of which will appear by reference to the facts certified by the Honorable Beverly T. Crump, Chairman of the said State Corporation Commission, and found at pages 9–15 of the record.

From this order an appeal was taken to the Supreme Court of Appeals of Virginia, where such proceedings were had and taken as resulted in an order by that tribunal on March 17th, 1904, affirming the action of the State Corporation Commission in the following language:

> "And the court having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal *situs* of the vessels and barges assessed for taxation by the finding of the State corporation commission is, for that purpose, within the jurisdiction of the State of Virginia and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned by a non-resident corporation, that they may have been enrolled under the act of Congress at some port outside the State of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore it seems to the court here that the finding of the State corporation commission appealed from is without error, and said finding is approved and affirmed."

Whereupon a writ of error was obtained to this Honorable Court upon

ASSIGNMENTS OF ERROR

as follows:

> "The supreme court of appeals of Virginia

erred in affirming the finding of the State corporation commission of Virginia, that the vessels of the plaintiff were taxable by the State of Virginia and assessing the same for such taxation. And in holding such assessment of the plaintiff's vessels not to be in conflict with the Constitution of the United States, and of laws made in pursuance thereof.

The validity of the said finding of said commission and taxation of said vessels was controverted and drawn in question by the plaintiff in error on the ground of the same being repugnant to the Constitution of the United States and to laws of Congress made in pursuance thereof, and in contravention thereof, in the following particulars:

First: The supreme court of appeals erred in affirming the finding of the State corporation commission and in holding that the legal *situs* of the vessel property of the Old Dominion Steamship Company in the proceedings mentioned and assessed for taxation by the said commission was for that purpose within the State of Virginia, and amenable to the tax imposed thereon, notwithstanding said vessels were owned by the plaintiff, a corporation of the State of Delaware and a citizen of the United States, and duly enrolled outside of the State of Virginia pursuant to the acts of Congress, licensed for the coasting trade, and engaged in interstate commerce, which holding and decision are in violation of sections 4131, 4141, 4311 and 4312 of the Revised Statutes of the United States.

Second: The said final judgment and decision of the said Supreme Court of Appeals is erroneous in not holding the said taxation of the vessels of the plaintiff in error, to be a regulation of interstate commerce by the State of Virginia, in violation of, and repugnant to, article I, section 8, clause 3, of the Constitution of the United States, which gives to Congress the power to regulate commerce among

the several States and with the Indian Tribes."

THE FACTS.

Under the Constitution of Virginia (Article XII, section 156, sub-section f), the State Corporation Commission is required to "certify to the Appellate Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal."

The facts certified in this case will be found on pages 9-15 of the record and are in part as follows:

> "On which hearing the following facts were adduced before the said commission, namely: That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the senate and house of representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic ocean and communicating navigable waters, between the city of New York in the State of New York and Norfolk and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said transportation business owned and operated the vessel property above named, that these vessels with the exception of the tug Germania whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside of the State of Virginia: that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean going steamers of the company to be used: that in consequence the vessels above enumerated were used to receive the freight and passengers as aforesaid, giving the

shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean going vessels of the steamship company, and so the ultimate destination, namely New York and elsewhere outside of Virginia was reached; that any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia with the name and port of such enrollment painted on the stern of each of them; that the said vessels though regularly enrolled and licensed for coatwise trade were then used on old established routes upon navigable waters within Virginia as follows, to-wit:"

The certificate of facts proceeds with the name of the vessels hereinbefore set out and their respective routes, following with some special facts concerning the Berkley and the Brandon, namely that one of them was constructed at Richmond, Va., in the year 1902 and both fitted up for passenger as well as freight traffic and that a retail liquor business was conducted on these two steamers under a license obtained from the Virginia State authorities as well as under a similar license obtained from the United States Revenue authorities.

ARGUMENT.

The plaintiff in error insists that the said vessels being owned by a non-resident and regularly enrolled under the laws of the United States and engaged in commerce upon the navagable waters of the country were not and are not taxable by the State of Virginia or elsewhere than at their *home port.*

It further insists that the action of the State Corporation Commission of Virginia affirmed by the Supreme Court of Appeals of that State is for the reasons set out in the foregoing assignments of error erroneous and should be reversed.

Vessels such as those involved in this proceeding are by congressional legislation peculiarly and especially the subject of Federal law and regulation.

Section 4141, United States Revised Statutes provides as follows:

> "Sec. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides."

Should the vessels belong to a corporation then the enrollment and license may be issued in the name of the president or secretary of the company, which officer to that extent is dealt with as the owner or managing owner. See U. S. Rev. Statutes as follows:

"Sec. 4313. Enrollments and licenses for vessels owned by any incorporated company may be issued in the name of the president or secretary of such company; and such enrollments or licenses shall not be vacated or affected by any sale of shares of stock in such company.

"Sec. 4314. Previously to granting enrollment and license for any vessel, owned by any company, the president or secretary of such company shall swear to the ownership of such vessel, by such company, without designating the names of the persons composing such company; which oath shall be deemed sufficient, without requiring the oath of any other person interested or concerned in such vessel.

"Sec. 4315. Upon the death, removal, or resignation of the president or secretary of any incorporated company owning any (steamboat or) vessel, a new enrollment and license shall be taken out for such steamboat or vessel."

Vessels engaged in the coastwise trade or on other navigable waters of the United States are, by sections forty three hundred and eleven (4311) and forty three hundred and twelve (4312), United States Revised Statutes, *enrolled* as distinguished from those engaged in foreign trade, which by section forty one hundred and forty one (4141) are *registered*. The qualifications as to the ownership and place of enrollment are the same as in case of registration.

Vessels enrolled under this provision become vessels of the United States.

"Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vesseis from the sea, are ships and vessels of the United States,

entitled to the privileges secured to such vessels by the act for enrolling and licensing ships or vessels to be employed in the coasting trade. 1 Stat. 205, 287."

Transportation Co. vs. Wheeling, 99 U. S. 278.

The place of enrollment so provided by this act is in law the "home port" of the vessel. Owing to the fugitive character of such property, possessed of the power to move at the will of its master anywhere on the navigable waters of the country, and designed for trade wherever the same may be found profitable anywhere upon the broad waters of the United States or elsewhere on the water highways of the world, it became pre-eminently necessary that some particular abiding place should be fixed and declared by law for them. Accordingly Congress has declared that the permanent abiding place of United States vessels shall be the port of enrollment, the port nearest the residence of the owner or managing owner, and if a Corporation be the owner then at the port nearest the residence of the President or Secretary. Certain characteristics or qualities have been imparted to these vessels by Federal legislation and the admiralty rules of the civilized world. Such, for example, as giving those who furnish them with supplies in any other than their "home port" a lien on such vessels for such supplies, and again, giving to her master power when she is overtaken by any particular stress of placing a lien upon her which shall be prior to all others, namely, a bottomry bond. Again, we find such property the particular source of national solicitude in the laws enacted by Congress and known as the "Limited Liability Act." Congress recogniz-

ing the need of building up a merchant marine, but equally appreciating the dangers to which vessels are exposed by reason of their being obliged in the course of their business to visit foreign waters and jurisdictions and become exposed to the dangers of the sea and river navigation, with a view of encouraging the investment of capital in such property, has declared, that the liability of the owners of such vessels for the negligence, etc., of their masters shall be limited to the value of the interest of such owner. In a word United States vessels differ in many essential and material respects from all other personal property, and the rules with reference to the taxation of personal property on land are not a guide to the taxation of ships. If ships could be taxed at any port where they habitually call or where they may trade great uncertainties would arise and injustice result. Hence the Supreme Court of the United States has uniformly held that because of their peculiar nature and employment and because Congress has fixed their "home port" they cannot be taxed as of their actual *situs* but only at their "home port."

Justice Brewer, in the *Pullman Palace Car Company vs. Twombly, 29 Fed. 658, 665*, speaking of the difference between other tangible property and vessel property, said as follows:

> "The place where a vessel is registered is by law its home port. That is considered its *situs* * * * * An attempt is made to place commerce by land in the same position as commerce by water, and to make in the former case the domicile of the owner equivalent to the port of registry in

> the latter. But until there has been some legislative declaration of equivalent import the obvious distinction between the two must be enforced and the ordinary rule of the *situs* of tangible property for purpose of taxation be applied to vehicles used in commerce on land."

This distinction is made plainer, if possible, by the expression of the Court in *Railroad Co. v. Maryland, 21 Wall. 456.* At page 470 of the report, Judge Bradley says:

> "Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."

In *Hayes vs. Pacific Mail Steamship Company, 17 Howard 596*, an effort was made by the State of California to tax certain vessels belonging to the Pacific Mail Steam-

ship Company, a corporation duly chartered in the State of New York, where the said vessels were owned and registered. The vessels in this case plied between New York and San Francisco, and between the latter port and certain ports in Oregon.

Mr. Justice Nelson delivering the opinion of the court, after citing the registry acts of the United States above quoted, proceeds as follows:

> "These provisions, and others that might be referred to, very clearly indicate that the domicile of a vessel that requires to be registered, if we may so speak, or home port, is the port at which she is registered, and which must be the nearest to the place where the owner or owners reside. In this case, therefore, the home port of the vessels of the plaintiffs was the port of New York where they were duly registered and where all the individual owners are resident and where is also the principal place of business of the company, and where, it is admitted, the capital invested is subject to State, county and other local taxes.
>
> "These ships are engaged in the transportation of passengers, merchandise, &c., between the city of New York and San Francisco by the way of Panama and between San Francisco and different ports in the Territory of Oregon.
>
> "They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand and which hold out to the owners sufficient inducements, by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States they are entered and cargoes discharged or laden on board independently of any control over

them, except as it respects municipal and sanitary regulations of the local authorities such as are not inconsistent with the constitution and laws of the General Government, to which belongs the regulation of commerce with foreign nations and between the States.

"Now it is quite apparent that if the State of California possessed the authority to impose the tax in question, any other State in the Union into the ports of which the vessels entered in the prosecution of their trade and business might also impose a like tax. It may be that the course of trade or other circumstances might not occasion so great a delay in other ports on the Pacific as at the port of San Francisco. But this is a matter accidental, depending upon the amount of business to be transacted at the particular port, the nature of it, necessary repairs, &c.. which in no respect can affect the question as to the *situs* of the property in view of the right of taxation by the State.

"Besides, whether the vessel leaving her home port for trade and commerce visits in the course of her voyage or business several ports or confines her operations in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port than at the others. She is within the jurisdiction of all or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent for years in the foreign carrying trade seeking cargo, carrying and unloading it from port to port during all the time absent; but they neither lose their national character nor their home port as inscribed upon their stern.

"The distinction between a vessel in her home

port and when lying at a foreign one, or in the port of another State, is familiar in the admiralty law. She is subjected in many cases, to the application of a different set of principles. 7 Pet. 324; 4 Wheat. 488.

"We are satisfied that the State of California had no jurisdiction over these vessels, for the purpose of taxation; they were not, properly abiding within the limits so as to become incorporated with the other personal property of this State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

The steamboat property of the Old Dominion Steamship Company, operated as above described, in the certificate of facts, is as clearly engaged in the business and commerce of the country upon its highways as in the case just quoted from. These vessels are neither owned by citizens or residents of the State of Virginia, nor enrolled or registered in that State.

The record in this case does not show whether these vessels were actually taxed at their home port or not.

It matters not whether they are actually so taxed by the State where they are enrolled. They are *liable* to taxation there and that answers the law.

This was expressly held in Morgan v. Parham, 16 Wall. 471. The court says in the case where the State of Alabama was attempting to tax the vessel property of a citizen of New York and registered in New York as follows:

"Whether the steamer "Frances" was actually

> in New York during the year 1866 and 1867 is not shown by the case. It is not important. She was liable to taxation there. That State alone had dominion over her for that purpose. Alabama had no more power to tax her or her owner than had Louisiana, or than Florida, Georgia and South Carolina would have had in the case, I have supposed."

The Supreme Court of the State of Michigan has expressly upheld the doctrine contended for by the Old Dominion Steamship Company.

In *Roberts vs. Charlevoix Twp.*, 60 Mich. 192, Campbell J., said for the court that a vessel owned by a non-resident and registered under the United States navigation laws does not, by engaging in business within the State become subject to its taxing power, and ends the discussion by saying:

> "This doctrine having been settled by the court of last resort there would be no propriety in discussing it."

The Supreme Court of the State of Florida has with equal emphasis announced the same doctrine.

In *Johnson vs. De Bary-Baya Merchants Line*, 37th Fla. 499, the court says:

> "The vessels were owned by a New York corporation and had acquired a *situs* in that State by being registered in the port of New York, the nearest to the residence of the owner, and were engaged in commerce in that State where it is conceded, the most profitable employment could be procured for them. The mere fact of being employed in interstate commerce would not exempt

them from taxation, and we do not say that registration in a foreign port and non-resident ownership should control absolutely, but such ownership and registration render them primarily and presumptively taxable only in their home port. This is clearly the doctrine of the Supreme Court of the United States—the court of last resort in such a case.

The boats of the non-resident corporation were used in the very business for which they were constructed, and they were in Florida waters because they could be more profitably employed there. Some of them were transferred to other fields as profit dictated, and it does not appear that they all might not have been taken away at any time if it had been to the interest of the owner to move them."

The vessels in this case were used in trading on the St. John's river, and as adjuncts to the Clyde Line, a transportation company engaged in coastwise traffic between Florida and New York. The court in this case speaking further on the subject says:

" All property should in justice pay its proportionate part of tax burdens in return for protection given: but one State should not lay taxes upon citizens of other States unless their property has acquired a *situs* in the taxing locality so as to become a part of the property there situated.

* * * * * * * *

The character of such property is such as to give rise to the just rule under the United States registry acts that it is primarily taxable only at the home port where the owner resides."

The plaintiff in error respectfully insists that its said vessels are only taxable at their "home port."

If it were otherwise then said vessels would be subject to taxation not only at their home port, but also wherever *they might happen to be employed in trade upon the navi*gable waters of any of the States of the Union.

It was to avoid this injustice among other things that the wise, if somewhat arbitrary, rule was adopted by the United States in fixing the *home*, the permanent abiding place, of such vessels, at the port of enrollment.

The cases cited are conclusive unless the length of time which such vessels remain in the waters of another State may affect them. This is practically conceded so far as such vessels may be *temporarily* within Virginia waters.

Clearly the principle exempting such vessels from taxation should not be affected by the length of time they may remain away from their home port trading in the waters of another State. They are available only for use on the navigable waters of the country and liable to go and come as profit or the demands of trade may suggest. Therefore, they cannot be said to abide in any place *permanently*, save and except at the place fixed by law as their "home port." They can have but one "home port," and so long as that lasts just so long must such vessels be taxed there. The only way the "home port" can be changed is that prescribed by the navigation laws of the United States. See U. S. Revised Statutes, sections 4141, 4312, 4159 and 4329.

The allusion in some of the cases to the temporary visits of such non-resident vessels as the course of trade may require, cannot be construed to mean that such vessels ply-

ing on regular routes upon the navigable waters of the State lose thereby their legal situs. These temporary visits are inseparable from vessel property, and the trade which they alone can and do conduct.

Such allusions cannot be taken literally, but must be referred to the fugitive character of vessels.

In the "Frances" case, 16 Wall. 471, although the "Frances" there sought to be taxed had been trading on the same route for five years, Judge Hunt, page 479, says:

> "It is in law as if the vessel had never before or after that day been within the port of Mobile, but touching there on a single occasion when engaged in the interstate trade, has been subjected to a tax as personal property of that city."

Assuming for the purpose of argument, that it is possible, in view of the character of United States vessels, to say they can abide permanently elsewhere, than at the home port, the facts certified in this case show that the vessels of the Old Dominion Steamship Company were not so *permanently abiding* in Virginia as to become blended with the mass of the property within that State so as to be exposed to the same rules governing taxation as those which apply to property on land.

It will be seen by reference to the certified facts (record p. 11) that the Old Dominion Steamship Company "was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic Ocean and communicating navigable waters between the city of New York in the State of New York and Norfolk and certain other ports within the State of Virginia." That

these vessels "were used to receive the freight and passengers . . . giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean going vessels of the steamship company, and so the ultimate destination, namely, New York and elsewhere outside of Virginia was reached; that any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for inter-state traffic especially and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk." While it is true that these vessels "were then used on old established routes upon navigable waters within Virginia," it is also true that they were "regularly enrolled, under the United States laws, outside of the State of Virginia, with the name and port of such enrollment painted on the stern of each of them" and were constructed, designed and regularly licensed for the coastwise trade.

It is apparent that though the route was an old established route, that these vessels like all other vessels, were liable to go at any moment wherever trade demands might make it more profitable for them to go, and in fact, one of them, the Hampton, was at the time omitted by the State Corporation Commission, because she was under charter in other waters in New York.

In a word, while the route was an old established route, it does not appear, and as a matter of fact it is not true, that these same vessels do always run on that route, or would always run on that route. They were liable to be substituted by others at any time and to go elsewhere. This inevitable, fugitive, bird-like quality of these vessels, and all such craft, made it impossible for them to be and abide permanently within the jurisdiction and under the protection of the laws of Virginia. In the very nature of this property no protection could be afforded them by the laws of Virginia. Jurisdiction over them was and is in the Federal and Admiralty Courts. So far from their being under the protection of the Virginia laws, these very laws declare and regard them as non-residents, and therefore liable to the citizens of Virginia by proceedings *in rem* for any debts or other obligations which might be due from them to such citizens. Liens against them recorded under State law were and are of no avail unless also recorded in the U. S. Custom House where they are enrolled.

We respectfully submit that our contention is supported by the authorities cited, and especially by that broad policy of our National Government which has seen fit to declare that vessels duly enrolled shall everywhere and under all circumstances be treated and dealt with for purposes of taxation and all other purposes only by the State having jurisdiction over such "home port." Any other policy would be productive of the greatest injustice, since it would permit the authorities having jurisdiction over the "home port" to tax such vessels because their legal situs was within its borders, and yet would permit any other and every other

State upon whose waters such vessels might be found trading, to put a further and additional tax upon them.

If the principle contended for by the Commonwealth in this case is conceded it would follow that while she could equally tax the vessel property of her own citizens, she could equally tax the vessel property of the citizens of any of the other states, which might be found in her waters, and likewise expose the vessel property of her own citizens to be taxed by the other States in whose waters they might be found trading. The confusion and injustice following such a condition is more than an ample justification of the principle which permits such property to be taxable only at its legal situs or "home port" and not anywhere it may be actually found trading in the waters of any State of this Union.

If the right of taxing vessels is to be determined by the length of time they may remain within the waters of any particular State, who is to determine what that length of time shall be?

Shall the State authorities say that all such vessels as may be found within her borders on the first day of the current tax year shall be so taxable?

Shall they say that all such vessels as shall remain within her borders three months, six months, nine months, twelve months, or for any other period arbitrarily determined? One of the States might prescribe one period and one another, and so confusion and injustice would be inevitable.

We submit that upon the authorities cited the principle for which we contend is the only one having those qualities

of justice, equity and stability, which the nature of vessel property demands and which can alone satisfy the national policy manifested in the legislation of Congress. It would be an interference with national commerce forbidden by the Federal Constitution.

The plaintiff in error further submits that the action of the said Corporation Commission affirmed by the Supreme Court of Appeals of that State, holding the said vessels liable to taxation by the State of Virginia is a regulation of interstate commerce by that State, in violation of and repugnant to Article 1, section 8, clause 3 of the Constitution of the United States, which gives to Congress the power to regulate commerce with foreign nations, among the several States and with the Indian tribes, and also in violation of sections 4131, 4141, 4311, and 4312 of the Revised Statutes of the United States.

Wherefore the plaintiff in error respectfully insists that this Honorable Court shall review and reverse the said order and finding of the Supreme Court of Appeals of Virginia, and enter such an order as may be just and right.

Respectfully submitted,

WM. H. WHITE,

Counsel for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 231.

OLD DOMINION STEAMSHIP COMPANY

vs.

COMMONWEALTH OF VIRGINIA.

In Error to the Supreme Court of Appeals of the State of Virginia.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

It is to be regretted that the Attorney General has not seen fit to address his argument to the only contention urged in behalf of the plaintiff in error.

The question involved and discussed in the opening brief is plainly stated on the first page thereof, as follows:

CAN THE STATE OF VIRGINIA CONSISTENTLY WITH ARTICLE I., SECTION 8, CLAUSE 3, OF THE

CONSTITUTION OF THE UNITED STATES AND THE ACTS OF CONGRESS PURSUANT THERETO LAWFULLY TAX VESSELS OWNED BY NON-RESIDENT CITIZENS, DULY ENROLLED UNDER THE NAVIGATION LAWS OF THE UNITED STATES LICENSED FOR AND ENGAGED IN THE COASTWISE TRADE?

There is positively no suggestion that it was beyond the power of the State to tax tangible property on land within its jurisdiction, though owned by a non-resident, but the distinction between all such property and vessels enrolled under the laws of Congress at a port outside of the State of Virginia where the owner resides, is emphatically stated and relied on.

This distinction is made plain on page 10 of the opening brief, as follows:

> "In a word, United States vessels differ in many essential and material respects from all other personal property, and the rules with reference to the taxation of personal property on land are not a guide to the taxation of ships. If ships could be taxed at any port where they habitually call or where they may trade, great uncertainties would arise and injustice result. Hence the Supreme Court of the United States has uniformly held that because of their peculiar nature and employment and because Congress has fixed their 'home port' they cannot be taxed as of their actual situs, but only at their 'home ports.' "

Such being the conceded case of the plaintiff in error, we repeat our regret that the greater part of the brief for the Commonwealth should be devoted to the consideration of

matters not involved in this controversy, and we will not further revert to the first seven pages of the same.

We are also constrained to this course, because of the limited time for the filing of this reply.

The Attorney General substitutes his own inferences for the certified facts.

For instance, commenting on our contention "that the boats are engaged mainly in interstate commerce and only incidentally" in any other business, he says, p. 8:

> "As to this contention, I observe, first, that it is impossible that it can be true that the intra-state business of these lines is 'purely' incidental."

And again:

> "It is, perhaps, unfortunate that there seems to have been no evidence before the State Corporation Commission as to the extent of the intra-state business of these lines. It would be passing strange if it did not constitute a very large percentage of the aggregate business."

A reference to the certified facts, record p. 11, will show that the Corporation Commission after stating that the plaintiff in error was a Corporation of Delaware engaged in interstate trade between New York and Norfolk, certifies as follows:

> "That any other business transacted by the above named vessels was incidental in character and comparatively insignificant in amount."

In spite, therefore, of the incredulity of the Attorney General, the above is a controlling fact in this case.

The same is true of the *regularity* of the license and enrollment of these vessels, about which the Attorney General betrays a similar unwillingness to abide by the certified facts.

Among such facts, page 11 of the record, is found the following:

> "That each and all of the said vessels were *regularly enrolled* under the United States laws outside of the State of Virginia, with the name and port of such enrollment painted on the stern of each of them."

We submit, therefore, that with the *regularity* of the enrollment of these vessels so *emphatically certified*, there is no room for the apparent doubt found on page 9 of the opposing brief, as follows:

> "The record fails to disclose *where* these vessels are enrolled."
> "If they are properly enrolled, their enrollment is presumably, &c."

The *facts certified* equally do not justify the assertion of counsel, page 9 of his brief, that the place of enrollment "may be technically the 'home port' of these vessels, although it may be, and doubtless is, true that none of them ever was or ever will be in the port of New York, or ever will be outside of the landlocked waters of Virginia where they are all permanently located and regularly engaged, day after day and year after year, in plying exclusively between Virginia ports, never for an instant going outside of her territorial boundaries and

rightful jurisdiction." With even greater force do these comments apply to similar statements on p. 13 of opposing brief. There is absolutely nothing in the record to justify these assertions. On the contrary, the record, p. 11, expressly states:

> "That the said vessels were built and designed for the interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk. * * * * * that the said vessels though regularly enrolled and licensed for coastwise trade were then used on old established routes upon navigable waters within Virginia."

The nature of the business transacted by these vessels is found among the certified facts, p. 11 of record.

The Attorney General seems to confound the *permanency*, so to speak, of these vessels in Virginia with that of the "old established routes." The very character of the construction, the license and enrollment of these vessels demonstrate that while they were employed at the time in Virginia waters they were licensed for and engaged in the coastwise trade, liable and ready to go wherever such trade might demand.

He quite authoritatively insists that "In such case, the *artificial* will yield to the *actual situs*, and the latter will determine the just and the legal *locus* of the property for taxation," adding, that "these views are fully sustained by the following adjudications."

Northwestern Lumber Company v. Chehalis County, 64 Pac. Rep. 909.

National Dredging Co. v. State, 99 Ala. 462.

Norfolk & Western Railway v. Board of Public Works, 97 Va. 23.

Minturn et als vs. Hays, 2 Cal. 590.

We do not agree with opposing counsel in his estimate of these cases.

1st. *The Northwestern Lumber Company v. Chehalis County*, 64 Pac. Rep. 909. The Court in this case seems to have rested its decision very largely upon the following considerations. Speaking of the vessels under discussion, the Court says:

> "They appear to have been used for all these years as appurtenant to, and a part of, the lumbering plant and business of the plaintiff in Chehalis county. Upon these facts we conclude that the situs in fact of the three tugs is in Chehalis county, and that there was a valid assessment levied upon their value."

It further appeared in this case that the Assistant Secretary and Manager of the Company resided in Chehalis county, where the vessels were assessed for taxation.

2nd. *Norfolk & Western Railway Co. v. Board of Public Works*, 97 Va. 23. This case turned upon the fact that the vessel property was owned by a Virginia Corporation and were located in Virginia at the home of the owner.

3rd. *Minturn et als vs. Hays*, 2 Cal. 590. This case, upon an examination, is without any possible influence upon the question at issue. The steamboat sought to be taxed was dealt with by the Court precisely as if it had been the property or

land of a non-resident within the limits of California. Its character as a United States vessel was not even alluded to. Indeed, no law was invoked save the local law of California applicable to all property within the limits of that state, and by that law alone was the case adjudged.

4th. *National Dredging Co. v. State*, 99 Ala. 462. We admit that this case goes to the full length of counsel's contention and is directly opposed to ours.

The reasoning of the Court, however, does not appeal to our judgment. It speaks as follows:

> "There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property, and may be moved from place to place and port to port by water, furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float, and could be moved from place to place only over land."

The distinction between property on land and United States vessels is entirely ignored.

It is interesting, also, to observe the comment made upon this case in the work by Messrs. Prentice and Egan, styled the COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION. On page 235 the authors, commenting on the Alabama case, say as follows:

> "It is very doubtful whether this case can be reconciled with the Federal law on the subject. No vessel has more than one home port, and that is fixed by the statute at the port nearest the residence of the

> owner. At that place the vessel must be registered and taxed. A rule which fixes situs at the actual location of the vessel is inconsistent with a rule which disregards actual location and determined situs by reference only to the residence of the owner."

In this work it will be found that our view of this question is adopted.

5th. *Johnson v. DeBarry Baya Merchant Line*, 37 Fla. 499. The estimate of this case taken by the Attorney General is not borne out by a careful inspection of the case itself. Its history is singularly possessive, like that of the case at bar. The vessels were used on the St. Johns River in Florida as adjuncts to the ocean-going steamers of the Clyde Line plying between that State and New York just as those of the plaintiff in error are used on the James River in Virginia. We have treated this case at length on pages 15 and 16 of our opening brief.

Under the third division of the Attorney General's brief, page 11, he again by innuendo assails the regularity of the enrollment and character of the vessels of the plaintiff in error. He says:

> "Whatever may be the purpose of such enrollment—however innocent it may be in this case—to sanction it for the purpose of granting immunity from taxation would be to throw down the bars and fling wide open the doors to fraudulent devices for such purposes."

He follows this with quite a vivid expression of alarm, lest the citizens of Virginia may be induced by the "accom-

modating disposition in the matter of granting charters to companies to carry on business beyond their borders" shown by certain of the States of this Union to fraudulently escape taxation in Virginia by having their vessels enrolled outside of that State.

While we sympathize with our opponent in the apparent sincerity of his alarm, we respectfully submit that his fears are ungrounded. The "home port" as required and defined by the United States Navigation Laws "cannot be selected capriciously or in fraud of law," as suggested by counsel. The residence of the owner is the first requirement of the law, and then follows the port of entry nearest such residence as the next requirement. These two complied with, and we have the "home port." There is no danger of Virginia citizens emigrating to New Jersey to find cover for their vessel property, because if they did, they would be subjected to taxation in that State.

There is nothing harsh or inequitable in the rule. Virginia and every other State is permitted to tax the vessels owned by its citizens, but none can tax vessels owned by citizens of another State and duly enrolled as United States vessels.

Probably no country has such a complete system of navigation laws as the United States. They cover every conceivable phase of commerce by water, and are such as to preclude any of the fraudulent schemes of designing vessel owners depicted by counsel. Every vessel navigating in the coasting trade as those in controversy, is required to have an enrollment

showing where the vessel was built and when, her name, the name of her owner and that of her master, that they are both citizens of the United States, her dimensions, the character of the vessel, whether steam or sail, and every conceivable detail, all of which have to be stated under oath and must be recorded in the United States custom house at the home port.

This enrollment must be kept on the vessel wherever she goes, under penalties, and is liable to inspection at any time and place by an appointed officer of the government, and must be surrendered when there is any change in ownership or residence of the owner.

If vessels so enrolled design engaging in the coasting trade they must procure a license from the proper port, making the prescribed oath as to ownership, etc., as above set out. This license runs for a year at a time and must be regularly renewed. Periodical reports must be made to the proper customs officers, and any change in ownership, masters, or indeed, anything affecting them is to be reported, especially change of owner.

See "Title L, Regulation of Vessels in Domestic Commerce," United States Revised Statutes.

It is one of the facts certified, that the vessels of the appellant are "regularly enrolled and licensed for coastwise trade." Record, p. 14.

We insist that the Attorney General has not met the sole question involved, which is:

Can the vessels of a non-resident, regularly enrolled and

licensed for coastwise trade under the United States Navigation Laws, and engaged in commerce upon the navigable waters of the country, be taxed by Virginia because they trade habitually in her waters?

We say they cannot in reason, law or the inherent nature of vessel property.

Again, we regret that the Attorney General has not discussed this nor commented on but one of the authorities cited in our brief in support of our contention.

He seems to concede the correctness of the proposition so far as such vessels may be *temporarily* within Virginia waters, by quoting with approval the language of the Court in

Pullman Palace Car Co. v. Penn., 141 U. S. Rep. 18-23.

Opposing counsel misapprehends the true significance of the meaning of this Court in the language used by it in the case referred to. We allude particularly to the statement that ships or vessels "are not subject to taxation in another State at whose ports they *incidentally* and *temporarily* touch for the purpose of delivering or receiving passengers or freight." The incidental and temporary touching so referred to by this Court has reference to the inherent character and business of such vessels. They only touch the land incidentally and temporarily "for the purpose of delivering or receiving passengers or freight." They live upon the navigable waters of the country, and not, as Pullman Palace Cars, upon a fixed railway track. They, by the very nature of the business and trade

which they conduct, touch "land only incidentally and temporarily." Their home is upon the bosom of the navigable waters of the country over which the United States government has sovereign jurisdiction. That such is the meaning of the incidental and temporary touching at ports is abundantly borne out by the language of this Court in the paragraph immediately succeeding that quoted by opposing counsel, viz:

> "Between ships and vessels, having their situs fixed by act of Congress, and their course over navigable waters, and *touching land* (italics ours) *only incidentally and temporarily;* and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious. As has been said by this Court: 'Commerce on land between the different States is so strikingly dissimilar, in many respects, from commerce on water, that it is often difficult to regard them in the same aspect in reference to the respective constitutional powers and duties of the State and Federal governments. No doubt commerce by water was principally in the minds of those who framed and adopted the Constitution, although both its language and spirit embrace commerce by land as well. Maritime transportation requires no artificial roadway. Nature has prepared to hand that portion of the instrumentality employed. The navigable waters of the earth are recognized public highways of trade and intercourse. No franchise is needed to enable the navigator to use them. Again, the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature. So that State interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible. But it is different with transportation by land."
>
> *Pullman Car Co. v. Penn.*, 141 U. S., p. 23.

THE TAX CANNOT BE JUSTIFIED ON THE GROUND THAT THE VESSELS RECEIVE THE PROTECTION OF THE LAWS OF VIRGINIA.

The quotation from the Pullman Car case just above given, quite sufficiently defines the only governmental authority over such property.

The Federal Government has created such property, regulates it, and alone protects it.

The question involved must be answered in the negative, without regard to the length of time the vessels may remain in Virginia waters.

We admit that the vessels are not exempt simply because they are engaged in interstate commerce, but insist that owing to their peculiar character and the recognized difference between commerce by land and commerce by water they can have no situs for taxation save that fixed by Federal regulation, viz: the "home port."

In conclusion we beg to urge upon the Court the following points:

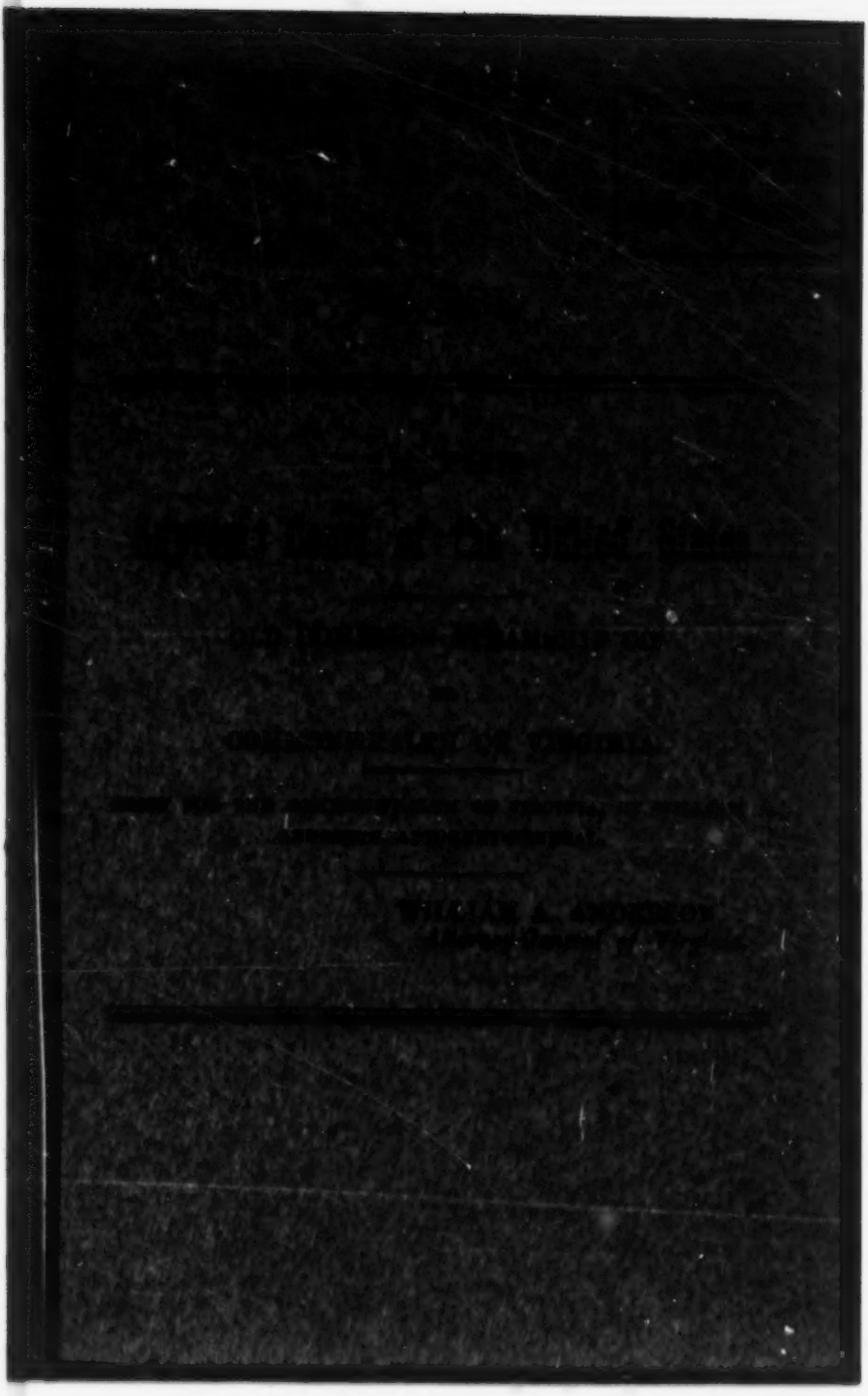
First: That the legislation of Congress has stamped upon vessel property special and peculiar characteristics which distinguish it from all other personal property and which make it impossible to apply the rules applicable to property on land to vessels regularly enrolled under the United States statutes and engaged in commerce upon the navigable waters of the country.

Second: That as a consequence of these inherent qualities of such vessels and of the character of the navigable waters on which they alone can operate, it is impossible, equitably to have their actual situs control their taxable character, and hence the necessity for giving them a *legal home*, namely, the port of registration nearest the residence of their owner.

Third: Inasmuch as the certified facts in this case show that the vessels sought to be taxed by the State of Virginia are the property of a non-resident of that State and duly enrolled and licensed for the coastwise trade under the laws of the United States and engaged in commerce upon the navigable waters of the country, they are beyond the taxing power of the State.

Fourth: The fact that they are operating on established lines upon navigable waters within the borders of Virginia as adjuncts or feeders to other vessels of the plaintiff in error engaged in the coastwise trade between New York and Norfolk does not in any way cause them to forfeit their non-resident character or change their legal "home port."

WM. H. WHITE,
For Plaintiff in Error.



IN THE

Supreme Court of the United States.

OLD DOMINION STEAMSHIP CO.

vs.

COMMONWEALTH OF VIRGINIA.

BRIEF FOR THE COMMONWEALTH OF VIRGINIA, BY WILLIAM A. ANDERSON, ATTORNEY-GENERAL.

The question involved in this case is, whether it is competent for the State of Virginia to tax the steamboats belonging to a non-resident corporation, all of which are permanently located within her jurisdiction, and are used and ply exclusively upon "old established routes" entirely upon the tidal rivers and bays of Virginia and between ports all of which are situated in this State, but which boats have been enrolled (under the United States laws) in some port outside of Virginia, by the Delaware corporation which owns them.

These boats are:

(1) The steamer "Hampton Roads," which is used exclusively and regularly upon a route between Fort Monroe, Hampton, and Norfolk.

(2) The steamer "Mobjack," which plies regularly between the city of Norfolk and points in Mathews and Gloucester counties.

(3) The boats "Luray" and "Accomac," which run upon a regular schedule between Smithfield and Norfolk.

(4) The steamer "Virginia Dare," which runs upon an established line between Suffolk and Norfolk; and

(5) The steamers "Berkley" and "Brandon," which run upon a regular schedule up and down James river between Richmond and Norfolk.

There is no evidence that any of these steamers (except one of those used on the route between Richmond and Norfolk) was ever outside of Virginia waters.

There is no evidence that any of these steamers was ever in any port outside of Virginia.

As a matter of fact, the only ports which any of these boats ever enters are Virginia ports.

These boats are engaged entirely in transporting passengers and goods between points in Virginia, some of which traffic (and it is claimed, much the larger part of it) is ultimately destined to points beyond this State; but some of it is confined absolutely to intrastate commerce. All of them are bound to take and carry all goods or passengers destined to points within Virginia, which may be offered to them. They do not undertake to deliver a passenger, or a pound of freight, in one continuous passage to any point outside of Virginia, though they do undertake to carry passengers and freight to Norfolk and there to transfer them to an interstate line owned by the same company and transport them to a point beyond the State of Virginia—viz., the city of New York; and, in like manner, they receive from their New York and Norfolk line passengers and freight destined to points in Virginia, and they issue and sell "through" passenger fares and tickets both ways. Interstate and domestic commerce are both essentially and integrally and necessarily parts of the business of these lines, within the State of Virginia, as is the case with every Virginia transportation company which has connections, either owned by itself or by other companies, with points beyond this State.

Appellant's counsel, in the extract given in his brief from the certificate of facts, omits very material and significant portions of that certificate, which omission I deem it proper to supply

by giving the entire order of the Supreme Court of Appeals of Virginia in the case, at the end of this brief.

Under this state of facts, the State Corporation Commission considered it its duty, and entirely within the constitutional powers of Virginia, to assess this property for taxation in this State; and the Supreme Court of Appeals of Virginia has, upon appeal, affirmed the action and decision of said Commission.

I.

This seems to be a day of case law; and a number of cases have been cited and are relied upon by the counsel for the appellant in his contention that this act of the Commission was *ultra vires*. While I respectfully submit that a careful examination of these cases will show that none of them, nor all of them together, sustain the conclusions so ingeniously attempted to be derived from them by the learned counsel, still it seems to me best that this case, and all other important cases, particularly when they are of first impression in this court, should be tried, stated and decided in accordance with established principles.

The general and unquestioned doctrine is that the State has the right to tax all property, movable as well as immovable, actually located within its confines.

> "The fiction which plays so important a part in other branches of the law, that movable property has its *situs* at the domicile of the owner, has no application to the power of the State to subject all property, movable and immovable, within its limits, to taxation."

And this is the law as to tangible property, *without reference to the domicile of its owner.*

The ancient fiction of the Roman law—*mobilia sequuntur personam*—does not apply to tangible movable personal property. Indeed, it is only a fiction in reference to movables, for, as to intangible property which consists of mere rights, they

necessarily inhere in the person to whom the rights belong, and are taxable at the domicile of their owner.—*State Tax on Foreign-held Bonds*, 15 Wall., 300.

In his work on "Conflict of Laws," 7th Ed., Sec. 550, Judge Story says:

> "The general doctrine is not controverted that, although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner; yet, this being but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined. *A nation, within whose territory any personal property is actually situate, has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there.*" (Italics mine.)

Mr. Judson, in his work on "Taxation," Sec. 393, quotes the above paragraph, and adds:

> "This principle of public law has been repeatedly declared by the Supreme Court in relation to the taxing power of the States. In *Coe* v. *Errol*, it was argued that the logs claimed to be in transit through New Hampshire were taxed to their owners in Maine as part of their general stock in trade. But the court held that this would have no influence on the decision of the question whether they were taxable in New Hampshire, saying, at page 524 (116 U. S.):
>
> "'We have no difficulty in disposing of the last condition of the question—namely, the fact, (if it be a fact) that the property was owned by persons residing in another State; for, if not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-

> residents of the State. We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States. If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also. It it hardly necessary to cite authorities on a point so elementary.'"

No proof is necessary to demonstrate the absolute accuracy of this statement of this proposition, which merely formulates one of the essential attributes of sovereignty.—*I. Cooley Taxation*, page 22 (3rd Ed.).

The only limitation upon this power in the States is that it shall not be so exercised as to hinder or interfere with interstate or international commerce. The tax, therefore, cannot be levied upon *the business* of interstate commerce, but it can be levied upon *property* used in interstate commerce, upon the *vehicles* of commerce, though these may be used in transportation of persons and goods destined to or from points without the State.

A tax on ships does not violate the commerce clause of the Federal Constitution. The only question is whether they are properly within the jurisdiction of the State levying the tax. If they are, the right of the State to tax them is unquestioned.—*Ravennel* v. *Charleston*, 4 Rich. L., 286.

It is competent for a State to levy a tax on steamboats plying exclusively in its own waters, owned by its own citizens, although enrolled and licensed as coasting vessels, under the

laws of the United States.—*Lott* v. *Mobile Trade Co.*, 43 Ala., 578.

The State may tax such vessels, although they are used in interstate commerce. Such a tax is not a burden upon, or a regulation of, commerce among the States.—*Perry* v. *Torrence* (Ohio), 32 Am. Dec., 725.

A State may tax sleeping-cars used upon a railroad within the State, although they are owned by a foreign corporation and are employed in interstate commerce.—*Denver & Rio Grande R. R. Co.* v. *Church*, 17 Col., 1.

Railroad cars, engaged in interstate commerce, though owned and used by a foreign company, may be taxed by the State in which they are so used.—*Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18 (L. Ed. 35, p. 613); *Same* v. *Hayward*, 141 U. S., 36 (35 L. Ed., 621).

> "For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or resident of the State which imposes the tax."—(Mr. Justice Gray, delivering the opinion of the court in *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S., 18,—35 L. Ed., 616).
>
> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."—(*Ibid*, the learned judge, citing a number of cases in support of both propositions.)

And in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S., 218 (29 L. Ed., 166-167), in which the main question presented in this case was adjudicated as to an interstate line of ferry boats plying, not between ports of the same State, but between

ports in different States, engaged exclusively in interstate commerce, and therefore not so strong a case for the power of taxation as the one at bar, Mr. Justice Field, delivering the unanimous opinion of the court, says:

> "Still the fact remains that such a ferry is a means—and a necessary means—of commercial intercourse between the States bordering on their dividing waters, and it must, therefore, be conducted without the imposition by the States of taxes or other burdens *upon the commerce between them.* Freedom from such imposition does not, of course, imply exemption from reasonable charges as compensation for the carriage of persons, in the way of tolls or fares, *or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption.*" (Italics mine.)

The Supreme Court of the United States thus expressly held in that case that vehicles of transportation upon water, though engaged in interstate commerce, were liable to a property tax to the same extent and in the same manner that vehicles used in transportation upon land were rightfully and lawfully subjected to such a property tax—thus bringing cases involving the taxation of vessels, plying upon intra-state lines, distinctly within the numerous decisions of that court as to railroad cars and other like vehicles situated within a State, and used in interstate commerce therein, but owned by some non-resident corporation.

II.

I will now briefly notice the grounds upon which it is claimed by appellant's counsel that its steamboats in this State are taken out of the operation of the above well-established principles and positive adjudications of the State courts cited, and of the Su-

preme Court of the United States (as well in the cases cited, as in a number of cases reviewed or referred to in the Federal cases I mention).

1. The first alleged ground of immunity from taxation at the actual *situs* of the property is, that these boats are engaged mainly in interstate commerce, and only incidentally, or to a lesser extent, in intra-state traffic.

As to this contention, I observe, first, that it is impossible that it can be true that the intra-state business of these lines is purely "incidental." Under the law, and in the very nature of things, the domestic business which they carry or which is offered to them, is an integral and necessary part of their traffic, which they cannot decline to take, and which, it is admitted, they do carry whenever it is offered.

It is, perhaps, unfortunate that there seems to have been no evidence before the State Corporation Commission as to the extent of the intra-state business of these lines. It would be passing strange if it did not constitute a very large percentage of the aggregate business—particularly as to the passenger traffic—upon all of the lines, and, as to the freight traffic, upon the lines plying between Norfolk and Suffolk, Norfolk and Smithfield, Norfolk and Hampton and Old Point Comfort, and Norfolk and Mobjack Bay and the estuaries of that bay in Mathews and Gloucester counties.

It has been repeatedly held by the Supreme Court of the United States that vehicles of commerce, employed exclusively in interstate commerce, may be taxed in the State where they are located and regularly used.—*Pullman Palace Car Co.* v. *Hayward*, 141 U. S., 36 (35 L. Ed., 621).

And in the *Gloucester Ferry* case, it was adjudged, in the unanimous opinion of the court, that—

> "It is true that the property of corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to taxation, provided always it be within the jurisdiction of the State."—114 U. S., 206 (29 L. Ed., 163).

And as we have already seen, that decision was rendered as to a company whose business was wholly interstate.

2. Another ground relied upon is, that the owner of this property is a non-resident corporation.

As was decided in the *Pullman Car* cases cited above, and in a number of cases re-affirmed in those decisions, the fact that the owner of vehicles of commerce within a State is not a citizen or resident of that State, has nothing to do with the power of a State to tax such property. The only question is, whether the property is permanently, or transiently and temporarily, within the jurisdiction of the State.

3. Another ground, and the principal reliance of appellant's counsel, is that these vessels are enrolled under sections 4312 *et seq.* of United States Revised Statutes, at their home port, and the port nearest the residence of their owner, as vessels engaged in coastwise trade with the United States.

The record fails to disclose *where* these vessels are enrolled.

If they are properly enrolled, their enrollment is presumably either in some port of Delaware, the State of Appellant's domicile, or in New York, if that is the place of residence of its president and general manager (R. 10); and that may be technically the "home port" of these vessels, although it may be, and doubtless is, true that none of them ever was or ever will be in the port of New York, or ever will be outside of the land-locked waters of Virginia where they are all permanently located and regularly engaged, day after day and year after year, in plying exclusively between Virginia ports, never for an instant going outside of her territorial boundaries and rightful jurisdiction.

In such case, the *artificial* will yield to the *actual situs*, and the latter will determine the just and the legal *locus* of the property for taxation.

These views are fully sustained by the following adjudications:

In the case of *Northwestern Lumber Company* v. *Chehalis County*, 64 Pac. Rep., 909, the question arose as to the exemption of ocean-going tugboats from taxation by the State of

Washington, in whose waters they were exclusively employed, by reason of the fact that they were registered and assessed and paid taxes at the port of San Francisco, in the State of California, where their owner resided.

It was held, in an opinion which will be found of interest in connection with the questions in this case, that the registry was merely *prima facie* evidence of the *situs* of the vessels for taxation, and that, as they were permanently employed in the State of Washington, they were properly and legally taxable in that State. The recent cases are reviewed in the opinion of the court in that case, and its perusal will be found profitable.

And so, in *National Dredging Co.* v. *State*, 99 Ala., 462, the common-sense conclusion was reached that—

> "The question, indeed, is at last one of *situs* in fact; and, where this is shown, neither foreign registry nor foreign ownership is of any consequence."

The precise question arose in *Norfolk & Western Railway Co.* v. *Board of Public Works*, 97 Va., 23, where it was decided that tugs and barges, owned by the railway company, regularly enrolled in the city of Philadelphia, but permanently or indefinitely engaged in plying Virginia waters near Norfolk, are legally taxable in Virginia, notwithstanding their enrollment in another State.

And in *Minturn et als.* v. *Hays*, 2 Cal., 590, it was held that a steamboat, whose owners resided in New York, *where it was taxed*, but which was regularly engaged in running upon the navigable waters of California, between San Francisco and Sacramento, was legally taxable in California.

And, finally, after careful consideration, the Supreme Court of Appeals of Virginia, in this very case, in the order copied at the end of this brief, held that these vessels were liable to taxation in Virginia, the jurisdiction of their actual domicile.

The case of *Johnson* v. *De Barry Baya Merchant Line*, 37 Fla., 499 (37 L. R. A., 518), relied upon for the appellant, was a case in which the State of Florida undertook to tax vessels

which were from time to time engaged in commerce in New York, the State of their home port and their owner's residence, and were not permanently, but *transiently*, within Florida waters; said vessels were "duly registered" and "regularly returned for assessment and taxation at their home port"; and it was held that they were not liable to taxation in Florida.

The statement of the case distinguishes it from the case at bar. A "tramp" steamer would not be liable to taxation in a State where it was transiently employed, even if such employment were for a considerable period, provided only it was transient.

It must acquire an actual domicile within a State, to be subject to its jurisdiction for purposes of taxation. But it was not held in that case that the registry of such vessels was conclusive as to their legal *situs* for taxation, but merely that they were primarily and "presumptively" taxable only "at the port of registration," which in that case was in fact also their *bona fide* home port.

III.

Whatever may be the purpose of such enrollment—however innocent it may be in this case—to sanction it for the purpose of granting immunity from taxation would be to throw down the bars and fling wide open the doors to fraudulent devices for such purposes.

If, as is contended by the appellant, the ownership by a non-resident corporation, and enrollment at the pleasure of such corporation in a port of another State, would operate to give boats the actual and permanent *situs* of which was in Virginia, exemption from taxation by this Commonwealth, then it will be only necessary for all the owners of such water craft, plying in the waters of this State, to obtain a charter from Maine, New Jersey, or Delaware, or some other of the States that have shown such an accommodating disposition in the matter of granting charters to companies to carry on business beyond their borders, and then to have such boats enrolled in some port outside of Virginia, and to claim that they are protected by

the provisions of Secs. 4312 *et seq.*, U. S. Rev. Stat., or by the commerce clause of the Federal Constitution.

The courts have not held, and I am unwilling to believe that they will ever hold, that such an artificial and fictitious *situs* ought to control; or ought to be or will be allowed to relieve such property from its due contribution to the support of the government of the State where it is actually located, by whose laws it is protected, and whose ports and waters it uses in the business of its owners, and from whose people it is earning money for its non-resident proprietors.

Any such inequitable rule would offer such a premium to evasions of the character I have indicated, that it would not be long before all of the vessels engaged in intra-state commerce—but all of which are, to a greater or less extent, necessarily engaged in interstate commerce—upon the waters of Virginia, would be found to be owned by Delaware, or New Jersey corporations.

The meaning, the effect, the *rationale* of the various decisions of the Federal courts upon this subject, including those relied upon by the learned counsel for the appellant, are clearly stated in more than one decision of the United States Supreme Court, but very concisely expressed in the opinion of Mr. Justice Gray, already quoted from, in the *Pullman Palace Car* case, 141 U. S., 18 (35 L. Ed., 616), as follows:

> "Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners in one State, are not subject to taxation in another State at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual *situs* within its jurisdiction, and, therefore, can be taxed

only at their legal *situs,* their home port and the domicile of their owners"—citing a number of cases to the same effect.

It requires no argument to show that this case comes within neither the terms nor the reason of the law as here so satisfactorily expressed.

There are a number of more or less material facts bearing upon the merits of this case, as to which I regret that the record is either silent or is incomplete.

Among them is, the nature and extent of the intra-state business done by these vessels. Some of them, particularly those plying between Norfolk and Hampton and Old Point Comfort, Norfolk and Smithfield, and Norfolk and Suffolk, are very little more than ferry boats running regularly between neighboring points in Virginia, and necessarily carrying a very large proportion of local traffic, both passengers and freight, to and from Newport News and Norfolk, which are getting to be not only places of large consumption, but of large distribution also, and places to which Virginians resort for shopping, for business, and for pleasure.

Nor does it appear what sort of connections are made between these lines, particularly that plying from Richmond, and the interstate line between Norfolk and New York; nor whether the chief part of the passenger business on all of these lines is not intra-state business.

Nor does it appear what is the character of these vessels; whether they are built for ocean navigation; whether they would not be swamped in almost any ordinary storm that beats upon the Atlantic coast, and which they would necessarily encounter in any regular coastwise service; whether, in fact, they were not all built expressly for the service they are now rendering in Virginia waters; nor does it appear that these vessels have been taxed, or, indeed, are taxable, in New York or Delaware; none of which, however, are matters of real moment in respect to the main question presented in this case.

IV.

To briefly recapitulate: The grounds relied upon by counsel for appellant seem to be:

(1) That these vessels are owned by a non-resident of Virginia. That is an immaterial circumstance. The permanent *locus* of the *property*, and not the *residence* of its *owner*, determines its *situs* for taxation.

> *State Tax on Foreign-held Bonds*, 15 Wall., 319;
> *Pullman Palace Car Co* v. *Pennsylvania*, 141 U. S., 18;
> *Transit Co.* v. *Lynch*, 177 U. S., 152.

(2) That these vessels are engaged in interstate commerce. That, also, according to the repeated adjudications of this court, fails to give to the *instruments and vehicles*, which carry such traffic between the States, immunity from taxation by the State in whose jurisdiction such vehicles have their actual *situs*.

> *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S., 30;
> *Adams Express Co.* v. *Ohio State Auditor*, 165 U. S., 194.
> *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S., 185;
> *American Refrigerator Transit Co.* v. *Hall*, 174 U. S., 70;
> *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S., 152.

(3) And lastly and chiefly, the learned counsel claims that these vessels, although habitually, continously and permanently within the jurisdiction of Virginia, and regularly engaged in carrying interstate and intra-state commerce, exclusively between Virginia ports, are immune from taxation in Virginia because their Delaware owner has had them enrolled in New York, or Delaware, or somewhere outside of Virginia.

This is really the only question in the case. Although this question has been decided by the highest courts of several of the States, where it has arisen, in favor of the validity of the tax, it does not seem to have ever been *directly* adjudicated by this court; yet the reason and principles of the decisions by this court as to the liability of personal property generally, and particularly as to the liability of the vehicles of commerce upon land, to taxation by the State in whose jurisdiction they are actually located, fully sustain the legality and the rightfulness of the taxation of these vessels by Virginia.

WILLIAM A. ANDERSON,
Attorney-General of Virginia.

April, 1905.

APPENDIX.

VIRGINIA:

In the Supreme Court of Appeals, at Richmond, March 17, 1904.

OLD DOMINION STEAMSHIP COMPANY, Appellant,
vs.
COMMONWEALTH OF VIRGINIA, Appellee.

Upon appeal from a finding of the State Corporation Commission, entered on the —— day of November, 1903, declaring the steamers Mobjack, Accomac, Hampton Roads, Luray, Virginia Dare, Brandon, and Berkley, and the steam tug Germania and seven barges, property of appellant, taxable under the laws of the State of Virginia, and imposing a property tax thereon for the year 1903.

The facts presented by the transcript of the record of the finding aforesaid are as follows:

That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the Senate and House of Representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic ocean and communicating navigable waters, between the city of New York, in the State of New York, and Norfolk, and certain other ports within the State of Virginia. That said steamship company, in the prosecution of its said transportation business, owned and operated the vessel property above named; that these vessels, with the exception of the tug Germania, whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside the State of Virginia; that owing to the shallow waters where these vessels plied it was impossible

in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above numerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination—namely, New York and elsewhere outside of Virginia—was reached; that any other business transacted by the above-named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially, and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia with the name and port of such enrollment painted on the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade, were then used on old established routes upon navigable waters within Virginia, as follows, to-wit:

First. The steamer Hampton Roads between Fort Monroe and Hampton and Norfolk.

Second. The steamer Mobjack between points in Mathews and Gloucester counties and Norfolk.

Third. The steamers Luray and Accomac between Smithfield and Norfolk.

Fourth. The steamer Virginia Dare between Suffolk and Norfolk.

Fifth. The steamers Berkeley and Brandon between Richmond and Norfolk; and

The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901 or early in 1902, one of them having been constructed at the William R. Trigg ship yard, in the city of Richmond, and the other outside of the State of Virginia. Early in the year 1902, they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route and since that time, the Old Dominion Steamship Company has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of state-room accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied under the revenue laws of the State of Virginia for a license to sell liquor at retail on each of these steamers, and on July 1st, 1902, there was granted through the Commissioner of the Revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30th, 1903. On or about the same time, the said steamship company complied with the revenue laws of the United States and paid the necessary revenue tax through the custom-house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903, the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, approved April 16th, 1903, and so obtained licenses for the year 1903-1904 to sell liquor at retail on each of these steamers on their route between the city of Richmond and Norfolk, and likewise, on or about the

same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal *situs* of the vessels and barges assessed for taxation by the finding of the State Corporation Commission is, for that purpose, within the jurisdiction of the State of Virginia, and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned by a non-resident corporation, that they may have been enrolled under the act of Congress at some port outside the State of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore, it seems to the court here that the finding of the State Corporation Commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant thirty dollars damages and its costs by it about its defence expended upon this appeal.

All of which is ordered to be entered upon the order book here, and certified to the State Corporation Commission, to be entered of record in its order book there, as required by law.

Supreme Court of the United States.

No. 231.—October Term, 1904.

The Old Dominion Steamship Company, Plaintiff in Error, vs. Commonwealth of Virginia.	In error to the Supreme Court of Appeals of the State of Virginia.

[May 15, 1905.]

On March 17, 1904, the Supreme Court of Appeals of the State of Virginia, in a matter appealed from a finding of the State Corporation Commission, entered the following findings and order:

"That the Old Dominion Steamship Company was a non-resident corporation, having been incorporated by the senate and house of representatives of the State of Delaware; that it was then and had been for many years theretofore engaged in the transportation of passengers and freight on the Atlantic Ocean and communicating navigable waters, between the city of New York, in the State of New York, and Norfolk, and certain other ports within the State of Virginia. That said steamship company in the prosecution of its said transportation business owned and operated the vessel property above named; that these vessels, with the exception of the tug Germania, whose movements and use will be hereinafter stated, visited various ports or points within the State of Virginia, for the purpose of receiving freight and passengers, for which they issued bills of lading and tickets to points outside the State of Virginia; that owing to the shallow waters where these vessels plied it was impossible in most instances for the larger ocean-going steamers of the company to be used; that in consequence the vessels above numerated were used to receive the freight and passengers as aforesaid, giving the shipper of freight a bill of lading for the same destined to New York and other points outside of Virginia, and the passenger a ticket to his destination, and thus transported such freight and passengers to deeper water at Norfolk and Old Point Comfort where, upon such bills of lading and tickets, the passengers and freight were transferred to one of the larger ocean-going vessels of the steamship company, and so the ultimate destination, namely, New York, and elsewhere outside of Virginia, was reached; that any other business transacted by the above-named vessels was incidental in character and comparatively insignificant in amount; that the said vessels were built and designed for interstate traffic especially and were adjuncts to or branches of the main line of the Old Dominion Steamship Company between New York and Norfolk; that each and all of the said vessels were regularly enrolled, under the United States laws, outside of the State of Virginia, with the name and port of such enrollment painted on the stern of each of them; that the said vessels, though regularly enrolled and licensed for coastwise trade, were then

used on old established routes upon navigable waters within Virginia, as follows, to wit:

"First. The steamer Hampton Roads between Fort Monroe and Hampton and Norfolk.

"Second. The steamer Mobjack between points in Mathews and Gloucester Counties and Norfolk.

"Third. The steamers Luray and Accomac between Smithfield and Norfolk.

"Fourth. The steamer Virginia Dare between Suffolk and Norfolk.

"Fifth. The steamers Berkeley and Brandon between Richmond and Norfolk; and

"The steamers Berkeley and Brandon ply between Richmond and Norfolk. These two steamers were completed in the year 1901, or early in 1902, one of them having been constructed at the William R. Trigg shipyard in the city of Richmond, and the other outside of the State of Virginia. Early in the year 1902 they were placed upon the line between Norfolk and Richmond, one steamer leaving Richmond each evening and arriving in Norfolk each morning, thus giving a night trip every night each way between Richmond and Norfolk. At the time these steamers were placed upon this route and since that time, the Old Dominion Steamship Company has by public advertisement called attention to the fact that these two steamers were especially fitted in the matter of stateroom accommodations for carrying passengers between Richmond and Norfolk, and the said two steamers have since that time been advertising for the carriage of passengers and freight on their route between Richmond and Norfolk, and have been regularly carrying freight and passengers between the said two points in Virginia as well as taking on freight and passengers for further transportation on their ocean steamers at Norfolk. The Old Dominion Steamship Company applied, under the revenue laws of the State of Virginia, for a license to sell liquor at retail on each of these steamers, and on July 1st, 1902, there was granted through the commissioner of the revenue of the city of Richmond a license to the Old Dominion Steamship Company for the sale of liquor at retail on each of these steamers, said licenses to expire on April 30th, 1903. On or about the same time the said steamship company complied with the revenue laws of the United States, and paid the necessary revenue tax through the custom house at the city of Richmond for the purpose of selling liquor at retail on each of these steamers. In the spring of 1903 the said steamship company, in order to obtain licenses to sell liquor at retail on each of these steamers, applied for the same in the city of Richmond and complied with the requirements of section 143 of the new revenue law, approved April 16th, 1903, and so obtained licenses for the year 1903–1904 to sell liquor at retail on each of these steamers on their route between the cities of Richmond and Norfolk, and likewise, on or about the same time, complied with the revenue laws of the United States in the matter of selling liquor at retail on each of the said steamers on said route.

"Sixth. The steam tug Germania, which was used in the harbor of Norfolk and Hampton Roads for the purpose of docking the large ocean-going steamers of the Old Dominion Steamship Company and the transferring from different points in those waters freight from connecting lines destined to points outside of Virginia.

"And the court, having maturely considered said transcript of the record of the finding aforesaid and the arguments of counsel, is of opinion that the legal *situs* of the vessels and barges assessed for taxation by the finding of the State corporation commission is, for that purpose, within the jurisdiction of the State of Virginia, and that said property is amenable to the tax imposed thereon—notwithstanding the fact that said vessels and barges are owned by a non-resident corporation, that they may have been enrolled under the act of Congress at some port outside the State of Virginia, and that they are engaged, in part, in interstate commerce—and doth so decide and declare. Therefore it seems to the court here that the finding of the State corporation commission appealed from is without error, and said finding is approved and affirmed. It is further considered by the court that the appellee recover against the appellant thirty dollars damages and its costs by it about its defence expended upon this appeal."

To review this order the Old Dominion Steamship Company sued out this writ of error.

Mr. Justice BREWER delivered the opinion of the Court.

The facts being settled, the only question is one of law. Can Virginia legally subject these vessels to State taxation? The general rule is that tangible personal property is subject to taxation by the State in which it is, no matter where the domicil of the owner may be. This rule is not affected by the fact that the property is employed in interstate transportation. *Pullman's Palace Car Company* v. *Pennsylvania*, 141 U. S. 18, in which Mr. Justice Gray, speaking for the court, said (p. 23):

"It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or foreign commerce, like other personal property within its jurisdiction."

See also *Cleveland &c. Railway Co.* v. *Backus*, 154 U. S. 439–445; *Western Union Telegraph Co.* v. *Taggart*, 163 U. S. 1–14.

This is true as to water as well as to land transportation. In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, 217, Mr. Justice Field, in delivering the opinion of the court, after referring to certain impositions upon interstate commerce, added:

"Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption."

See also *Passenger Cases*, 7 How. 283, in which Mr. Justice M'Lean said (p. 402):

"A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce, the same as other property owned by its citizens."

The same doctrine is laid down in the same case by Mr. Chief Justice Taney (p. 479.) See also *Transportation Company* v. *Wheeling*, 99 U. S. 273. That the service in which these vessels were engaged formed one link in a line of continuous interstate commerce may affect the State's power of regulation, but not its power of taxation. True, they were not engaged in an independent service, as the cabs in *Pennsylvania Railroad Company* v. *Knight*, 192 U. S. 21, but, being wholly within the State, that was their actual situs. And, as appears from the authorities referred to, the fact that they were engaged in interstate commerce does not impair the State's authority to impose taxes upon them as property. Indeed, it is not contended that these vessels, although engaged in interstate commerce, are not subject to State taxation, the contention being that they are taxable only at the port at which they are enrolled. In support of this contention the two principal cases relied upon are *Hays* v. *The Pacific Mail Steamship Company*, 17 How. 596, and *Morgan* v. *Parham*, 16 Wall 471.

Registry and enrollment are prescribed by sections 4141 and 4311, R. S. for vessels of the United States engaged in foreign and domestic commerce. Section 4141 reads:

"SEC. 4141. Every vessel, except as is hereinafter provided, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides."

By sections 4131 and 4311 vessels registered or enrolled are declared to be deemed vessels of the United States. As stated by Chancellor Kent, in his Commentaries, vol. 3, p. *139:

"The object of the registry acts is to encourage our own trade, navigation, and ship-building, by granting peculiar or exclusive privileges of trade to the flag of the United States, and by prohibiting the communication of those immunities to the shipping and mariners of other countries. These provisions are well calculated to prevent the commission of fraud upon individuals, as well as to advance the national policy. The registry of all vessels at the custom house, and the memorandums of the transfers, add great security to title, and bring the existing state of our navigation and marine under the view of the General Government. By these regulations the title can be effectually traced back to its origin."

This object does not require and there is no suggestion in the statutes that vessels registered or enrolled are exempt from the ordinary rules respecting taxation of personal property. It is true by sec. 4141 there is created what may be called the home port of the vessel, an artificial *situs*, which may control the place of taxation in the absence of an actual *situs* elsewhere, and to that extent only do the two cases referred to go.

In *Hays* v. *Pacific Mail Steamship Company*, *supra*, ocean steamers owned and registered in New York and regularly plying between Panama

and San Francisco and ports in Oregon, remaining in San Francisco no longer than was necessary to land and receive passengers and cargo and in Benicia only for repairs and supplies, were held not subject to taxation by the State of California. In the course of the opinion, by Mr. Justice Nelson, it was said (p. 599):

"We are satisfied that the State of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly abiding within the limits so as to become incorporated with the other personal property of the State; they were there but temporarily, engaged in lawful trade and commerce, with their *situs* at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid."

Clearly the ruling was that these steamers had acquired no actual *situs* within the State of California; that occasionally touching at ports in the State did not make them incorporated with the other personal property of the State. Hence, having no *situs* in California they were not subject to taxation there, but were subject to State taxation at the artificial *situs* established by their registry.

In *Morgan* v. *Parham*, *supra*, it appeared that a steamship was registered in New York, under the ownership of the plaintiff; that she was employed as a coasting steamer between Mobile and New Orleans; that she was regularly enrolled as a coaster in Mobile by her master and received a license as a coasting vessel for that and subsequent years. It was held that she was not subject to taxation by the State of Alabama. Mr. Justice Hunt, in delivering the opinion of the court, said (pp. 474, 476):

"The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveler on that day had been passing through that city in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either of these persons would be subject to taxation as property within the city. It is conceded by the respective counsel that it would not have been.

"On the other hand this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat, or a post coach, engaged in a local business within a State, may be subject to local taxation, although it carry the mail of the United States. The commerce between the States may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. . . . It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily only."

In other words, here as in the prior case, there was no actual situs of the vessel. She had not become commingled with the general property of the State and was therefore subject to taxation at the artificial *situs*, the port of her registry.

In *Transportation Company* v. *Wheeling, supra,* Mr. Justice Clifford concludes his discussion with this statement (p. 285):

"From which it follows, as a necessary consequence, that the enrollment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property."

Of course, if the enrollment does not exempt vessels from taxation as other personal property, the place of enrollment, whether within or without the State in which the property is actually situated, is immaterial, for other like property is taxable at its actual situs.

So far as the State authorities are concerned reference may be made to *Lott, Tax Collector,* v. *Mobile Trade Company,* 43 Ala. 578; *National Dredging Company* v. *The State,* 99 Ala. 462; *Northwestern Lumber Company* v. *Chehalis County,* 25 Wash. 95.

Our conclusion is that where vessels, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a State, they are subject to taxation in that State, although they may have been registered or enrolled at a port outside its limits. The conclusion, therefore, reached by the Court of Appeals of Virginia was right, and its judgment is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.